

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
GAME SHOW NETWORK, LLC,)	MB Docket No. 12-122
Complainant,)	File No. CSR-8529-P
)	
v.)	
)	
CABLEVISION SYSTEMS CORP.,)	
Defendant)	

TO: Chief Administrative Law Judge Richard L. Sippel

**CABLEVISION SYSTEMS CORPORATION'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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September 11, 2015

TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW	1
II. THE PARTIES.....	6
A. GSN	6
B. Cablevision, WE tv, and Wedding Central	9
III. CABLEVISION’S RELATIONSHIP WITH GSN.....	11
IV. GSN HAS NOT PRESENTED ANY DIRECT EVIDENCE OF DISCRIMINATION	15
A. Cablevision’s Retiering Decision Had Nothing to Do With WE tv or Wedding Central: It Was a Good Faith, Rational Business Decision	15
B. Cablevision’s Decision to Retier GSN Was Not a Pretextual Tactic Designed to Obtain Additional Carriage of Wedding Central	27
V. GSN HAS NOT PROVEN THAT GSN AND WE TV ARE SIMILARLY SITUATED	34
A. GSN and WE tv Do Not Broadcast or Target Similar Programming	35
B. GSN and WE tv Target and Deliver Different Audiences	60
C. GSN and WE tv Do Not Compete Meaningfully for Advertisers.....	76
D. GSN Has Never Been Part of WE tv’s “Competitive Set”	86
E. GSN and WE tv Do Not Compete for Viewers in Any Meaningful Way	91
VI. GSN HAS NOT PROVEN THAT AN INFERENCE OF DISCRIMINATORY INTENT MAY BE DRAWN FROM EVIDENCE THAT CABLEVISION TREATED WE TV AND WEDDING CENTRAL DIFFERENTLY THAN GSN ...	98
VII. GSN HAS NOT PROVEN THAT AN INFERENCE OF DISCRIMINATION CAN BE DRAWN FROM A COST-BENEFIT ANALYSIS OF CABLEVISION’S RETIERING DECISION	103
A. GSN Has Not Proven that Application of a Cost-Benefit Test to Cablevision’s Retiering Decision Shows that the Decision Was Unprofitable.....	103
B. Evidence of How Other MVPDs Carry GSN Is Not Proof of Discrimination by Cablevision.....	111
VIII. GSN HAS NOT PROVEN THAT CABLEVISION’S RETIERING WAS AN UNREASONABLE RESTRAINT ON GSN’S ABILITY TO COMPETE FAIRLY	113

A.	GSN Is a Broadly Distributed Network that Competes in the National Marketplace for Video Programming Distribution	114
B.	GSN Has Thrived Since the Retiering	114
C.	Cablevision Does Not Have Sufficient Market Power in the New York DMA to Unreasonably Restrain GSN	121
	PROPOSED CONCLUSIONS OF LAW	122
IX.	GSN HAS THE BURDEN OF PROVING EACH ELEMENT OF ITS CLAIM	123
X.	GSN HAS NOT MET ITS BURDEN OF PROVING THAT CABLEVISION DISCRIMINATED ON THE BASIS OF AFFILIATION	127
A.	GSN Has Not Presented Any Probative Direct Evidence of Discrimination	127
B.	GSN Has Not Proven that It Is Similarly Situated to WE tv or Wedding Central	130
C.	GSN Has Not Proven that Cablevision’s Retiering Decision Lacked a Legitimate, Non-Discriminatory Justification	138
D.	Cablevision’s Favorable Treatment of Its Affiliated Networks, Standing Alone, Is Not Circumstantial Evidence of Discrimination	141
E.	GSN Has Not Established that an Inference of Discrimination Can Be Drawn from a Cost/Benefit Analysis of Cablevision’s Retiering Decision ...	143
XI.	GSN HAS FAILED TO MEET ITS BURDEN OF PROVING THAT CABLEVISION’S CONDUCT UNREASONABLY RESTRAINED GSN’S ABILITY TO COMPETE FAIRLY	146
XII.	SECTION 76.1301(C) MUST BE NARROWLY CONSTRUED AS APPLIED TO THE CONDUCT OF CABLE OPERATORS	150
	CONCLUSION	154

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Agape Church, Inc. v. FCC</i> , 738 F.3d 397 (D.C. Cir. 2013)	152
<i>Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati</i> , 363 F.3d 427 (6th Cir. 2004)	153
<i>Chuang v. Univ. of Cal. Davis, Bd. Of Trs.</i> , 225 F.3d 1115 (9th Cir. 2000)	136
<i>Clark v. Takata Corp.</i> , 192 F.3d 750 (7th Cir. 1999)	145
<i>Comcast Cable Communications, LLC v. FCC</i> , 717 F.3d 982 (D.C. Cir. 2013)	<i>passim</i>
<i>Gonzales v. Police Dep’t, City of San Jose</i> , 901 F.2d 758 (9th Cir. 1990)	136
<i>Rice v. Gates Rubber Co.</i> , 521 F.2d 782 (6th Cir. 1975)	136
<i>Smith v. United Bhd. of Carpenters & Joiners of Am., A.F.L.</i> , 685 F.2d 164 (6th Cir. 1982)	136
<i>Time Warner Cable Inc. v. FCC</i> , 729 F.3d 137 (2d Cir. 2013).....	<i>passim</i>
<i>Turner Broadcasting System, Inc. v. FCC</i> , 512 U.S. 622 (1994).....	150, 151

Administrative Decisions

<i>Game Show Network, LLC, v. Cablevision Systems Corp.</i> , Hr’g Designation Order, 27 FCC Rcd. 5113 (MB 2012)	123, 124, 127, 129
<i>Revision of the Commission’s Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage</i> , Second Report & Order, 26 FCC Rcd. 11494 (2011).....	<i>passim</i>

<i>Herring Broadcast, Inc. d/b/a WealthTV v. Time Warner Cable, Inc.,</i> Recommended Decision, 24 FCC Rcd. 12967 (ALJ 2009).....	<i>passim</i>
<i>Herring Broadcast, Inc. d/b/a WealthTV v. Time Warner Cable, Inc.,</i> Mem. Op. & Order, 26 FCC Rcd. 8971 (2011)	131
<i>Amendment to the Commission’s Rules Concerning Effective Competition;</i> <i>Implementation of Section III of the STELA Reauthorization Act, Report &</i> <i>Order, MB Docket No. 15-53, FCC 15-62 (2015).....</i>	<i>149</i>
<i>TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time</i> <i>Warner Cable Inc.,</i> Mem. Op. & Order, 25 FCC Rcd. 18099 (MB 2010)	125, 138, 140
<i>TCR Sports Broad. Holding, LLP v. Comcast Corp.,</i> Mem. Op. & Hr’g Designation Order, 21 FCC Rcd. 8989 (2006)	126
<i>Tennis Channel, Inc. v. Comcast Cable Communications LLC,</i> Initial Decision, 26 FCC Rcd. 17160 (ALJ 2011)	123, 130, 136
<i>Tennis Channel, Inc. v. Comcast Cable Communications LLC,</i> Mem. Op. & Order, MB Docket No. 10-204, File No. CSR-8258-P (2012).....	150
<i>Tennis Channel, Inc. v. Comcast Cable Communications LLC,</i> Mem. Op. & Order, 27 FCC Rcd. 8508 (2012)	126, 127
<i>Tennis Channel, Inc. v. Comcast Cable Communications, LLC,</i> Order, 30 FCC Rcd. 849 (MB 2015)	125

Administrative Orders

<i>Game Show Network, LLC v. Cablevision Systems Corp.,</i> Mem. Op. & Order, MB Docket No. 12-222, FCC 15M-23 (June 19, 2015)	123
---	-----

Statutes, Rules, and Regulations

47 U.S.C. § 522(3)	9
47 C.F.R. § 76.1301(c).....	<i>passim</i>
47 C.F.R. § 76.1302(d)(3)(iii)(B)	47, 124
47 C.F.R. § 76.1302(f)(1)	143
FED R. EVID. 702	145
U.S. CONST. amend. I	150

Other Authorities

H.R.Rep. No. 102-628 (1992).....	155
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Defendant Cablevision Systems Corporation (“Cablevision”) respectfully submits the following Proposed Findings of Fact and Conclusions of Law in the above-captioned program carriage complaint proceeding brought by Complainant Game Show Network, LLC (“GSN”).

I. SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. GSN has failed to meet its burden of demonstrating that Cablevision discriminated against it in violation of Section 616 of the Communications Act and Section 76.1301(c) of the Commission’s rules by moving GSN from the Expanded Basic tier of service to a more narrowly-penetrated Sports & Entertainment tier in February 2011. GSN has not introduced a single piece of direct evidence that Cablevision discriminated against GSN in order to favor its affiliated programming networks, WE tv and Wedding Central. No document in evidence shows that Cablevision’s decision to retier GSN was based in any way on Cablevision’s desire to advantage affiliated networks. No witness testified that the retiering decision had anything to do with Cablevision’s affiliated networks. To the contrary, every Cablevision witness expressly denied any such connection. Every witness from Cablevision’s programming affiliate, Rainbow Networks (the owner of WE tv and, at the time of the retiering, Wedding Central), denied having any role in or even learning about Cablevision’s decision to retier GSN until after Cablevision made that decision.

2. GSN has also failed to prove its allegation that Cablevision made a pretextual decision to retier GSN in support of its objective of leveraging carriage of Wedding Central on GSN’s parent company, DIRECTV, in return for continued broad carriage of GSN by Cablevision. The evidence shows that GSN, not Cablevision, first hatched the idea of tying

carriage of Wedding Central on DIRECTV to GSN's carriage on Cablevision. Indeed, after Cablevision communicated its retiering decision to GSN in December of 2011, Derek Chang of DIRECTV, rather than any GSN executive, reached out to Cablevision to see what could be done to reverse Cablevision's carriage decision. There is no evidence in the record suggesting, much less proving, that Cablevision retiered GSN in the hope of engaging DIRECTV in a discussion of trading broader GSN carriage for carriage of Wedding Central.

3. In the absence of any direct evidence of discrimination, GSN must resort to circumstantial proof of Cablevision's discrimination. Again, the evidence falls woefully short.

4. Any circumstantial case of discrimination hinges on proof that GSN is similarly situated to a network affiliated with Cablevision and that such affiliated network received more favorable treatment than GSN.

5. The evidence adduced at trial overwhelmingly demonstrates that GSN is not similarly situated to either WE tv or Wedding Central based on the factors the Presiding Judge and the Commission have identified as relevant in prior proceedings.

6. GSN neither targets nor airs programming similar to WE tv's. WE tv targets and airs many types of programming of special interest to women in the critical 18 to 49 and 25 to 54 demographics, including reality shows, scripted dramas and comedies, documentaries and news shows, and movies specifically about and appealing to women. GSN is and always has been a network dedicated to game shows and competition-related programming. The networks' affiliation agreements describe starkly different programming, their schedules reflect distinct genres of shows that do not look and feel similar, contemporaneous business documents reveal a divide between game shows and women's programming, and the business executives of both WE tv and GSN confirmed the distinct programming in their testimony.

Unrebutted survey evidence adduced by Cablevision confirms that viewers perceive the sharp differences in programming between WE tv on the one hand and GSN on the other.

7. GSN also targets and delivers an audience that is not similar to the audience of WE tv. The evidence shows that GSN's claim that it targets and delivers the same 25 to 54 year-old female audience as WE tv is at best sporadic and aspirational. In the period prior to the retiering, GSN targeted a broad audience of game-playing enthusiasts, both men and women. Between of GSN's audience consisted of women and men above the age of 55. By contrast, WE tv consistently targets and delivers women between the age of 18 and 54, who make up the majority of WE tv's actual audience.

8. Because of its heavy concentration in its target audience, WE tv is an efficient vehicle for advertisers seeking to reach women ages 18 to 54. GSN, with a substantial concentration of viewers above the age of 55, is not. Even GSN's owner, DIRECTV, placed WE tv and GSN in different advertising "clusters" designed to appeal to advertisers targeting different demographics; WE tv is in DIRECTV's female cluster, while GSN is in DIRECTV's adult (i.e., men and women) cluster.

9. These clear demographic differences between WE tv and GSN, particularly in their delivery of women 18 to 49 and women 25 to 54 audiences, also lead advertisers to view the networks as dissimilar. The fact that GSN and WE tv have certain overlapping advertisers does not change the calculus. These large advertisers purchase time on dozens of networks in order to reach specific target audiences for the various brands and products that they sell.

10. Unable to show similarity in programming or audience to WE tv and Wedding Central at the time of the retiering, GSN has attempted to prove similarity in more

recent periods by claiming that Cablevision has committed an “ongoing violation” by refusing to restore GSN to broad carriage after having placed the network on its Sports & Entertainment tier. GSN did not plead any such continuing violation when it filed its complaint; but even if it had, it cannot show similarity at the time of the retiering decision by showing it had become “more similar” to Cablevision’s affiliated networks after the allegedly discriminatory carriage decision. In any case, the evidence shows that GSN was not similarly situated to WE tv or Wedding Central prior to, at the time of, or after, Cablevision’s retiering decision.

11. Even if it could establish that it and WE tv were similarly situated, GSN’s claims must fail because the evidence shows that Cablevision made a good faith decision to retier GSN for legitimate business reasons. Facing rapidly escalating carriage costs in 2010 attributable to broadcast network retransmission consent fees, network bundling of “must-have” programming, skyrocketing sports rights fees, and new competition, Cablevision explored how it could save money by dropping GSN and a number of other networks carried on its Family (Expanded Basic) tier. Cablevision executives responsible for managing the programming budget reviewed, discussed, and documented the reasons why GSN was a suitable candidate for elimination: Cablevision could save in excess of _____ per year in license fees; GSN was watched by relatively few Cablevision subscribers; GSN’s small group of viewers were unlikely to leave Cablevision in substantial numbers if the network were dropped; those loyal viewers were good candidates to subscribe to the Sports & Entertainment tier to retain GSN; and GSN had been out of contract with Cablevision since _____, giving Cablevision full discretion to retier GSN or drop it entirely. After lengthy consideration, Cablevision made a good faith business decision that allowed GSN’s small but loyal audience to retain access to GSN while allowing Cablevision to save more than _____ per year in license fees.

12. GSN's reliance on the D.C. Circuit opinion in the *Tennis Channel* case cannot convert Cablevision's legitimate retiering decision into a discriminatory one. The evidence at trial showed the benefits Cablevision accrued as a result of the retiering: a savings of over _____ per year in carriage fees, increased profit from over _____ subscribers who signed up for the Sports & Entertainment tier, and no discernible increase in subscriber "churn" as a result of the retiering. What scant material GSN presented in response—expert testimony concerning Cablevision's purported "goodwill" loss, for example—was predicated on unfounded assumptions, not a credible analysis.

13. Likewise, the other evidence introduced by GSN, such as its carriage on certain other large MVPDs, fails to prove that Cablevision's decision to place GSN on a sports tier was "inefficient" or "unprofitable," much less discriminatory. Although MVPDs that are larger than Cablevision—including _____—may have given GSN broader carriage than Cablevision, the evidence shows that other smaller MVPDs, which are much closer in size to Cablevision, have either carried GSN on a narrowly penetrated tier of service or, in some cases, not carried it at all.

14. Even if GSN could prove that GSN and WE tv are similarly situated—which it cannot—and prove that Cablevision's retiering decision was something other than a good-faith business decision—which it cannot—GSN also has to prove that its placement on Cablevision's Sports & Entertainment tier has unreasonably restrained GSN's ability to compete fairly. GSN has done no such thing: the evidence shows that in the almost five years since the retiering, GSN has increased the number of subscribers it reaches, maintained its ratings in both the national market and the New York local market, increased its advertising revenue, and increased its investments in original programming.

15. Finally, not only has GSN experienced substantial and meaningful growth since the retiering, it has failed to show that Cablevision had sufficient power to restrain GSN from competing fairly in any relevant market. In a properly-applicable national market, Cablevision does not and cannot exercise market power since its total subscribers represent only a small fraction of both GSN's current subscribers and the nationwide market of cable subscribers overall. And, even if one takes the view that the relevant market is a local one—a position that GSN has failed to substantiate or define in any rigorous economic manner—the evidence showed that Cablevision faces significant competition from other satellite and telco providers in the New York DMA that constrain it from exercising any significant market power.

PROPOSED FINDINGS OF FACT

II. THE PARTIES

A. GSN

16. Complainant GSN is a national cable network with headquarters in Santa Monica, California.¹ GSN was launched in 1994 under the name Game Show Network as a vehicle for its corporate owner, Sony, to exploit its library of classic game shows from the 1960s and 1970s.² In 2004, GSN changed its name from “Game Show Network” to “GSN” as part of a rebrand of the network.³ Although the rebrand implemented certain “packaging” changes for the network, its primary goal remained to “[e]volve and expand the brand to being everything game-related” and to “[r]einforce GSN's image as the leader in interactive games.”⁴

¹ Compl. ¶¶ 1, 10.

² GSN Exh. 297 ¶ 4 (Goldhill); CV Exh. 816 at 515; CV Exh. 332 ¶ 90 (Egan) (discussing GSN's reliance on “older library product”).

³ GSN Exh. 297 ¶ 5 (Goldhill); CV Exh. 12 at 24.

⁴ CV Exh. 12 at 20.

17. GSN is owned by Sony and, beginning in 2009, by DIRECTV. When GSN was retiered by Cablevision in December 2010, Sony and DIRECTV were equal partners in GSN and shared management control.⁵ Since the retiering,

18. Sony and DIRECTV control GSN through a Management Committee that meets annually at year end and receives updates about GSN's budget and other strategic plans.⁷ GSN's Management Committee is equivalent to a board of directors.⁸ From the time DIRECTV acquired an interest in GSN in 2009 through the time of the retiering, Derek Chang, the then-Executive Vice President of Content Strategy and Development at DIRECTV, sat on the Management Committee of GSN.⁹

19. At the time of the retiering, and through today, David Goldhill has been the President and CEO of GSN.¹⁰ John Zaccario, who testified at trial, was at the time of the retiering and currently is GSN's Executive Vice President of Advertising Sales, reporting to Mr. Goldhill.¹¹ At the time of the retiering, Dennis Gillespie (who testified at trial via deposition) was GSN's Executive Vice President of Distribution.¹² Dale Hopkins, who testified live at trial, succeeded Mr. Gillespie as Executive Vice President of Distribution in March 2011.¹³ Prior to

⁵ GSN Exh. 297 ¶ 4 (Goldhill); Joint Exh. 2 at 26:16-27:8 (Chang).

⁶ GSN Exh. 297 ¶ 4 (Goldhill).

⁷ Joint Exh. 2 at 19:7-16 (Chang); Tr. 43:1-44:17 (Chang).

⁸ Tr. 218:16-19 (Goldhill).

⁹ Joint Exh. 2 at 15:18-16:1, 18:23-19:6 (Chang).

¹⁰ Tr. 173:13-19 (Goldhill).

¹¹ Tr. 717:10-22, 744:2-5 (Zaccario).

¹² Joint Exh. 4 at 5:10-6:6 (Gillespie).

¹³ Tr. 614:9-12 (Hopkins).

and at the time of the retiering, Ms. Hopkins was the Chief Marketing Officer of GSN.¹⁴ Both Ms. Hopkins and Mr. Gillespie, in the role of Vice President of Distribution, reported to Mr. Goldhill.¹⁵ Finally, Kelly Goode (who testified by deposition) was the head of GSN's programming department at the time of the retiering. Ms. Goode held the title of Senior Vice President of Programming.¹⁶ She also reported directly to Mr. Goldhill.¹⁷

20. As of February 1, 2011—the date Cablevision implemented its retiering decision—GSN was a fully penetrated network with approximately _____ subscribers nationwide.¹⁸ Today, GSN has nearly _____ subscribers.¹⁹ GSN reported _____ million in revenue for 2010, including approximately _____ million in advertising revenue and approximately _____ million in affiliate revenues.²⁰ GSN's television revenue has _____.²¹ According to the most recent financial statements GSN produced in this litigation, as of year-end 2013, GSN had total revenue of _____, including total net advertising revenues of _____ million and affiliate fees of _____ million.²²

¹⁴ Tr. 586:5-7 (Hopkins).

¹⁵ Tr. 638:19-21 (Hopkins).

¹⁶ Joint Exh. 5 at 12:6-14 (Goode).

¹⁷ Joint Exh. 5 at 27:13-17 (Goode).

¹⁸ CV Exh. 256 at 4-5; Compl. ¶ 11.

¹⁹ See CV Exh. 325 at 7 (GSN 2014-2015 upfront presentation script describing the “Road to Million” subscribers).

²⁰ See CV Exh. 258 at 4 (GSN 2009 and 2010 Consolidated Financial Statements); CV Exh. 256 at 10-11 (GSN interrogatory responses).

²¹ See Tr. 382:22-383:8 (Goldhill); *see also* CV Exh. 262 at 4 (GSN 2013 Review & 2014 Budget presentation).

²² See CV Exh. 263 at 5 (GSN 2012 and 2013 Consolidated Financial Statements).

B. Cablevision, WE tv, and Wedding Central

21. Cablevision is a cable operator located in Bethpage, New York. At the time of the retiering, Cablevision had approximately 3.3 million subscribers, 2.9 million of whom were in the New York DMA.²³ Today, its total number of subscribers has fallen to approximately 2.7 million.²⁴

22. At the time of the retiering, Cablevision was a vertically integrated MVPD that both provided cable television and related services to subscribers in their homes and, through a separate subsidiary then known as Rainbow Holdings, operated and distributed the national cable networks AMC, IFC, Sundance, WE tv, and Wedding Central.²⁵ Rainbow Holdings was spun off from Cablevision in July 2011 and is now known as AMC Networks.²⁶

23. GSN alleges that it was “similarly situated” to two of the Rainbow networks at the time of the retiering: WE tv and Wedding Central.²⁷ WE tv is a national cable network that originally launched in 1997 as “Romance Classics.”²⁸ It relaunched in 2001 as “WE: Women’s Entertainment” and in 2006 shortened its name to “WE tv.”²⁹ At the time of the retiering, WE tv was a fully-penetrated network with approximately million subscribers,

²³ CV Exh. 270; Compl. ¶ 2.

²⁴ GSN Exh. 345 at 4.

²⁵ CV Exh. 338 ¶¶ 1, 33 (Dorée); CV Exh. 339 ¶¶ 1, 19 (Broussard); Joint Glossary at 4.

²⁶ Tr. 1538:16-24 (Montemagno). Cablevision does not dispute that at the time of the hearing, WE tv and Wedding Central were affiliated networks for purposes of Section 616. *See* 47 U.S.C. § 522(3) (defining “affiliate”).

²⁷ *See, e.g.*, Compl. ¶¶ 35-42.

²⁸ GSN Exh. 300 ¶ 9 (Brooks).

²⁹ *Id.*

and it has approximately million subscribers today.³⁰

24. Wedding Central launched in 2009 as a spin-off of WE tv's successful block of wedding-themed programming, and focused on programming related to weddings and related issues.³¹ Cablevision decided to shut down the network in 2011.³²

25. Executives from Cablevision's cable distribution and Rainbow divisions either testified live or by deposition regarding the events at issue here. On the distribution side, Tom Montemagno, who testified live at trial, held the position of Senior Vice President of Programming, reporting into Mac Budill, who was then the Executive Vice President of Programming.³³ Mr. Budill in turn reported to John Bickham, who was the most senior officer in Cablevision's cable distribution division at the time of the retiering.³⁴ Mr. Bickham held the title of President of Cable and Communications.³⁵ He testified via deposition.³⁶

26. Robert Broussard, who testified live, was Rainbow's President of Distribution at the time of the retiering.³⁷ Mr. Broussard reported to Ed Carroll, who was the Chief Operating Officer of Rainbow.³⁸ Elizabeth Dorée also testified live at trial. At the time of

³⁰ See GSN Exh. 301 ¶ 27 (Singer) (citing SNL Kagan data); GSN Exh. 245 at CV-GSN 0434074 (showing WE tv subscribers as of Q1 2014).

³¹ Tr. 1943:17-22 (Broussard); GSN Exh. 203 at CV-GSN 0361397; GSN Exh. 206 at CV-GSN 0361348; GSN Exh. 104 at CV-GSN 0270363 ("Wedding Central is the first and only 24-7 destination where women, who are fascinated by all things wedding related, can go to get engaged in and entertained by the aspiration and drama of weddings.").

³² Tr. 1946:7-10 (Broussard). Cablevision made the decision to shutter Wedding Central several months before AMC networks became an independent company. Joint Exh. 3 at 22:9-22 (Dolan).

³³ Tr. 1494:10-18 (Montemagno); Joint Exh. 1 at 12:25-13:3 (Bickham).

³⁴ Joint Exh. 1 at 11:24-12:2 (Bickham).

³⁵ Joint Exh. 1 at 8:11-17 (Bickham).

³⁶ See Joint Exh. 1 (Bickham).

³⁷ Tr. 1918:25-1919:2 (Broussard).

³⁸ Tr. 1976:25-1977:1 (Broussard); Joint Exh. 7 at 19:20-20:3 (Sapan).

the retiring, Ms. Dorée held the title of Senior Vice President, Scheduling & Acquisitions for WE tv.³⁹ At that time, Ms. Dorée reported to Kimberly Martin, who was the President and General Manager of WE tv and Wedding Central.⁴⁰ Like Mr. Broussard, Ms. Martin reported to Mr. Carroll.⁴¹ Mr. Carroll reported to Josh Sapan, President and CEO of Rainbow, who was the most senior officer at Rainbow.⁴² Ms. Martin and Mr. Sapan testified at trial by deposition.⁴³

27. At the time of the retiring, both Mr. Bickham, as Cablevision's senior-most cable distribution executive, and Mr. Sapan, as the head of Rainbow Networks, reported to Tom Rutledge, the Chief Operating Officer of Cablevision.⁴⁴ Mr. Rutledge, in turn, reported to James Dolan, Jr., the CEO of Cablevision, who testified by deposition at trial.⁴⁵

III. CABLEVISION'S RELATIONSHIP WITH GSN

28. Cablevision and GSN's relationship began in , when GSN approached Cablevision seeking carriage. Tom Montemagno principally negotiated Cablevision's initial carriage agreement with GSN, which went into effect in ⁶ This initial agreement was highly favorable to Cablevision.⁴⁷ It provided for carriage of GSN for five years, gave Cablevision the right to

³⁹ Tr. 1696:15-18 (Dorée).

⁴⁰ Joint Exh. 6 at 9:3-7, 17:14-18: 8 (Martin).

⁴¹ Joint Exh. 7 at 20:5-6 (Sapan).

⁴² Joint Exh. 7 at 8:22-9:12 (Sapan).

⁴³ See Joint Exh. 6 (Martin); Joint Exh. 7 (Sapan).

⁴⁴ Joint Exh. 7 at 19:20-20:11 (Sapan); Joint Exh. 1 at 8:7-10 (Bickham); Tr. 1537:13-14 (Montemagno).

⁴⁵ Tr. 1556:22-23 (Montemagno); Joint Exh. 3 at 30:14-19 (Dolan).

⁴⁶ See Tr. 1494:23-1495:14 (Montemagno); CV Exh. 4 Cablevision/GSN carriage agreement).

⁴⁷ See Tr. 1495:15-18 (Montemagno) ("[GSN] really got very aggressive in the agreement. And provided lots of incentives and made it a very attractive agreement.").

and granted Cablevision

⁴⁸ The agreement was renewed once, in
, before expiring in ⁴⁹.

29. Cablevision and GSN attempted to negotiate a new agreement.⁵⁰ During this period, GSN launched a series of shows, including poker programming, Extreme Dodgeball, and Celebrity Blackjack, as part of an effort to “get more men in prime time.”⁵¹ Cablevision and GSN exchanged a series of proposals for a new agreement, beginning in 2005.⁵²

30. The parties were unable to agree on key terms for a new agreement. In addition to seeking , GSN insisted on removing a number of provisions from the carriage agreement that were favorable to Cablevision. GSN wanted to eliminate

⁵³ In addition, GSN would not agree to a

which was important to Cablevision because it did not want to

54

⁴⁸ See Tr. 1495:19-1496:4, 1496:10-19 (Montemagno) (describing of GSN); CV Exh. 337 ¶¶ 9-15 (Montemagno).

⁴⁹ See Tr. 1500:4-8 (Montemagno); CV Exh. 337 ¶ 16 (Montemagno).

⁵⁰ See CV Exh. 337 ¶¶ 17-23 (Montemagno).

⁵¹ Tr. 257:5-12 (Goldhill); CV Exh. 12 at 20, 24, 35 (GSN 2004 Rebranding Deck, discussing GSN’s efforts to target male viewers).

⁵² See, e.g., CV Exh. 19 (comparing GSN proposal and Cablevision counter-proposal).

⁵³ See Tr. 1501:15-23 (Montemagno).

⁵⁴ See Tr. 1501:24-1503:23 (Montemagno) (discussing the importance of); CV Exh. 337 ¶ 21 (Montemagno) (identifying other networks with whom Cablevision obtained during this period).

31. Although Cablevision and GSN could not reach agreement, Cablevision continued to carry GSN out of contract and pay the subscriber fee due under the now-expired carriage agreement.⁵⁵ Out-of-contract carriage of a network was not unusual in the cable industry.⁵⁶ According to GSN CEO David Goldhill, GSN was not “very concerned” about the absence of a written agreement.⁵⁷

32. Negotiations between the parties resumed in 2007, following personnel changes at GSN.⁵⁸ Mr. Montemagno remained the principal Cablevision negotiator, while Dennis Gillespie, who had recently joined GSN as Senior Vice President for Distribution, represented GSN.⁵⁹ Mr. Gillespie had “a half dozen” conversations with Mr. Montemagno, met numerous times with Cablevision, and, in 2009, made a detailed presentation to Cablevision regarding GSN’s carriage.⁶⁰ That presentation emphasized that GSN was “the only TV network uniquely focused on . . . [c]lassic game show favorites with new original programming,” and discussed GSN’s “broad-based, family-friendly loyal audience.”⁶¹ From Mr. Gillespie’s first

; *see also* Joint Glossary at 3.

⁵⁵ See CV Exh. 4 at 3 (Cablevision/GSN carriage agreement, showing rate schedule).

⁵⁶ For example, by continuing to carry GSN out of contract and pay licensing fees, Cablevision treated GSN more favorably than did GSN’s corporate parent, DIRECTV, *See* Joint Exh. 4 at 38:4-24 (Gillespie) (discussing DIRECTV’s treatment of GSN).

⁵⁷ Tr. 211:25-212:2 (Goldhill).

⁵⁸ See CV Exh. 337 ¶¶ 24-25 (Montemagno).

⁵⁹ Tr. 1504:1-10 (Montemagno).

⁶⁰ Joint Exh. 4 at 24:16-20, 45:6-14 (Gillespie); *see also* CV Exhs. 40, 54 (notes from 2008 and 2009 meetings between Cablevision and GSN); CV Exh. 52 (Feb. 2009 GSN presentation to Cablevision).

⁶¹ See CV Exh. 52 at 2, 13; *see also* CV Exh. 337 ¶ 38 (Montemagno).

conversations with Mr. Montemagno, Cablevision made clear that it was receptive to a new agreement if the parties could agree on acceptable terms.⁶²

33. Although Mr. Montemagno and Mr. Gillespie had a cordial professional relationship that spanned many years, the two sides remained at a standstill over

⁶³ With respect to _____, GSN counsel has suggested that Mr. Montemagno “threatened” Mr. Gillespie at a February 2009 meeting by telling him that continued requests for _____ might jeopardize GSN’s carriage. Mr. Montemagno did not. As Mr. Montemagno explained, he and Mr. Gillespie “had a long relationship over many, many years. And I was very . . . transparent and honest and open with Mr. Gillespie. And I told him that if he were to press for _____ . . . my executive staff would likely really take a hard look at what we were paying in the relationship.”⁶⁴ Mr. Montemagno’s contemporaneous notes from the meeting confirm this, as does Mr. Gillespie’s own testimony.⁶⁵ Following the February 2009 meeting, Cablevision continued to carry GSN on an out-of-contract basis and pay GSN a _____ per subscriber per month license fee. Between February 2009

⁶² See Joint Exh. 4 at 33:2-7 (Gillespie); *see also* CV Exh. 33 (Nov. 6, 2007 email from Mr. Montemagno to Mr. Gillespie, enclosing a carriage proposal and stating _____).

⁶³ Tr. 1504:11-13, 18-9 (Montemagno).

⁶⁴ Tr. 1507:4-22; *see also* Tr. 1629:4-20 (Montemagno) (“[I] didn’t construe that as a threat, more as advice.”).

⁶⁵ See CV Exh. 54 (Mr. Montemagno’s meeting notes); Joint Exh. 4 at 46:8-47:5, 49:8-12 (Gillespie).

and the time Cablevision communicated its decision to retier GSN in December 2010, the parties engaged in no further discussions concerning a new carriage agreement.⁶⁶

IV. GSN HAS NOT PRESENTED ANY DIRECT EVIDENCE OF DISCRIMINATION

34. GSN must present either direct evidence that Cablevision made its retiering decision because of its affiliation with WE tv or Wedding Central, or circumstantial evidence that GSN is similarly situated to one of those affiliated networks receiving favorable treatment. Turning to the first prong of the test, GSN has failed to demonstrate through direct evidence that Cablevision predicated its decision to retier GSN on affiliation.

A. Cablevision's Retiering Decision Had Nothing to Do With WE tv or Wedding Central: It Was a Good Faith, Rational Business Decision

35. The trial record demonstrates that Cablevision's decision to retier GSN had nothing to do with GSN's affiliation or Cablevision's affiliated networks. Rather, the documentary evidence and testimony confirms that Cablevision was faced with an escalating cost environment and chose to save money by repositioning a relatively unpopular network that had been out of contract for several years. Far from being discriminatory, Cablevision's decision was based on good faith business judgment.

36. To put Cablevision's decision in proper context, Mr. Montemagno testified to the programming cost pressure Cablevision was under in the 2010 timeframe.⁶⁷

Cablevision, like other MVPDs, faced difficult market conditions during a "transformational

⁶⁶ Tr. 1507:23-25 (Montemagno). In light of the numerous phone calls, emails, and meetings between GSN and Cablevision during this period, GSN's assertion that Cablevision refused to negotiate cannot be reconciled with the record. Although Mr. Goldhill testified that Cablevision refused to meet with him personally (Tr. 220:7-10), Mr. Goldhill also testified that he never requested such a meeting. Tr. 308:18-309:11 (Goldhill).

⁶⁷ See CV Exh. 337 ¶¶ 26-34, 40-43 (Montemagno).

time” in the cable television industry.⁶⁸ These market adverse conditions included:

- Retransmission consent fees, where broadcasters were “now asking for significant fees that [MVPDs such as Cablevision had] never paid before”;
- Increasing competition for sports programming and other popular content;
- Industry consolidation, which required MVPDs to carry a programmer’s less popular networks on a “bundled” basis in order to gain access to content that customers actually wanted; and
- “[S]ignificant competition from . . . satellite providers [such as DIRECTV and Dish]” and new entrant telco providers, particularly Verizon.⁶⁹

37. These market conditions led to programming cost disputes with major networks that prevented Cablevision’s customers from accessing their content.⁷⁰ During these blackouts, Cablevision lost carriage of ABC, Home & Garden, the Food Network, and FOX—the last of which during the period it broadcast the World Series.⁷¹ Cablevision’s competitors, particularly Verizon, seized on these blackouts, launching marketing campaigns that encouraged Cablevision’s customers to switch providers.⁷²

38. These conditions were not unique to Cablevision, but rather impacted the entire industry. Contemporaneous statements by GSN board member Derek Chang corroborate Mr. Montemagno’s testimony.⁷³ On December 2, 2010, one day before Cablevision informed

⁶⁸ Tr. 1508:14-18 (Montemagno).

⁶⁹ Tr. 1508:14-1510:25 (Montemagno); *see also* Joint Exh. 1 at 39:13-25 (Bickham); Joint Glossary at 4 (defining telco).

⁷⁰ Tr. 1509:14-1510:1 (Montemagno).

⁷¹ *Id.* GSN’s counsel incorrectly suggested that Cablevision “canceled” FOX; in fact, the reverse is true, as FOX cut off its signal to Cablevision. *Contra* Tr. 87:4-6 (GSN opening).

⁷² *See* Tr. 1515:24-1516:17 (Montemagno). In contrast to competitor reaction to these high-profile disputes, no competing MVPD targeted Cablevision’s customers after Cablevision retired GSN. *See* CV Exh. 337 ¶¶ 71-73 (Montemagno).

⁷³ GSN’s Management Committee is akin to a board of directors. *See* Tr. 218:14-19 (Goldhill).

GSN of the retiering, Mr. Chang spoke to research analysts about the cost concerns facing DIRECTV; they were identical to those identified by Mr. Montemagno.⁷⁴ Mr. Chang questioned whether there was “a place for channels that only serve a small fraction of [DIRECTV’s] audience,” and noted that DIRECTV “and all of the other distributors will continue to take a sharper look at the channels we carry and determine which ones are necessary and which ones . . . may just cost too much for what they are.”⁷⁵

39. Internal GSN documents also acknowledge the same concerns. A 2010 GSN memorandum warned that

Likewise, GSN prepared a presentation for a 2011 sales conference that identified a number of marketplace trends, including “Sports/retransmission fee increases put[ting] squeeze on distributors’ margins,” “[s]urging usage of internet video,” and “[o]ver-the-top competition forcing distributors to respond with TV Everywhere offering[s],” and cautioned that “retrans revenue has gone from virtually zero in the past 5 years to proj[ected] \$4B in 2015.”⁷⁷

40. Finally, GSN’s cable distributors frequently relayed to Mr. Gillespie and Ms. Hopkins the same type of programming concerns identified by Mr. Montemagno and Mr.

⁷⁴ See Joint Exh. 2 at 94:14-100:20, 106:23-107:13 (Chang); CV Exh. 144 (transcript of Mr. Chang’s remarks at DIRECTV analyst meeting); CV Exh. 145 (article from Multichannel News, an industry trade publication, discussing Mr. Chang’s remarks and his comment that DIRECTV would “look to repackage channels where we have over-distributed, or frankly just to remove certain channels from our platform if they are not relevant”).

⁷⁵ CV Exh. 144 at 3-4.

⁷⁶ CV Exh. 98 at 1.

⁷⁷ CV Exh. 198 at 6-7.

Chang.⁷⁸ As Mr. Gillespie testified, retransmission consent fees were a particularly important concern for GSN and were “[m]aking headlines most everyday.”⁷⁹

41. Against this backdrop, in a July 15, 2010 budget meeting, Mr. Bickham asked the Cablevision programming team, including Mr. Montemagno, to assess whether GSN merited continued broad carriage on Cablevision.⁸⁰ Cablevision regularly performed this type of carriage assessment, and typically considered a variety of data, including information about network performance generated using Cablevision’s proprietary set-top box data (“STB data”) and information about network demographic profiles.⁸¹ Mr. Montemagno and his colleagues also considered as part of these assessments Cablevision’s contractual rights, including

82

42. In response to Mr. Bickham’s request, Mr. Montemagno and his team obtained and reviewed STB data and solicited feedback from Cablevision’s programming and

⁷⁸ Joint Exh. 4 at 122:6-125:3 (Gillespie); CV Exh. 140 at 1 (Nov. 22, 2010 email from Dennis Gillespie to Nico Fasano summarizing a meeting with [REDACTED] and relating that [REDACTED] was “really struggling with video side of the business” and facing “tremendous pressure on the cost side”); *see also* Tr. 616:2-619:22 (Hopkins) (discussing GSN’s contemporaneous knowledge of MVPD cost pressures).

⁷⁹ Joint Exh. 4 at 126:18-23, 129:9-130:3 (Gillespie); *see also* Tr. 599:13-20 (Hopkins) (acknowledging that MVPD cost concerns are a frequent issue in carriage negotiations).

⁸⁰ *See* Tr. 1508:1-13, 1511:1-5 (Montemagno); *see also* CV Exh. 337 ¶ 44 (Montemagno); CV Exh. 117; GSN Exh. 296; CV Exh. 121A at 1 (noting Mr. Bickham’s request for “a carriage assessment to evaluate and explore the possibility of removing GSN from our lineups in an effort to save in annualized license fees”); Joint Exh. 1 at 23:25-25:15 (Bickham).

⁸¹ *See* Joint Exh. 1 at 27:25-28:24 (Bickham) (describing carriage assessment process); *see also* Joint Glossary at 4 (defining set-top box data).

⁸² *See* CV Exh. 99.

product management teams.⁸³ Mr. Montemagno then prepared a detailed written carriage assessment discussing “the relevant background, facts, and considerations for evaluating our carriage situation with Game Show Network and how we feel about the possibility of removing it from our lineups.”⁸⁴ Mr. Montemagno’s July 22, 2010 memorandum, which “reflect[ed] the collective input” of Cablevision’s programming and product management groups, discussed the costs and benefits of changing GSN’s carriage, including:

- the fact that GSN was out of contract;
- the approximately _____ Cablevision was paying GSN in annual license fees;
- GSN’s content, which included “older game show reruns, more contemporary game shows, and original game shows”;
- GSN’s weak performance as reflected in Cablevision’s STB data, which showed that GSN “performed poorly and . . . ranked at the lower end of the spectrum of channels,” specifically _____ out of all networks carried by Cablevision;
- the fact that “the few viewers that watch [GSN] appear to watch it with regularity” and Cablevision’s understanding that “those viewers skew older”; and
- Cablevision’s concern that GSN would retaliate by leveraging its relationships with its corporate parent, Sony, if GSN were retiered.⁸⁵

⁸³ See CV Exh. 117 (explaining that Mr. Bickham “was interested in know[ing] more about box data”); GSN Exh. 296 (email to Bradley Feldman asking, “Can you give me Product’s perspective/viewpoint on this and whether or not you would recommend we drop the service. . .”); GSN Exh. 67 (July 21 email exchange discussing draft memorandum).

⁸⁴ CV Exh. 119 at 1; *see also* Tr. 1511:8-17 (Montemagno).

⁸⁵ CV Exh. 119 at 3-4; Tr. 1511:24-1515:23 (Montemagno); CV Exh. 337 ¶¶ 45-46 (Montemagno). Although GSN was out of contract, under the prior carriage agreement Cablevision had the right to

. GSN echoed Cablevision’s assessment: an internal GSN email acknowledged that Cablevision was GSN’s _____ CV Exh. 161 at 1 (internal GSN email from Feb. 2011 discussing Cablevision’s decision to retier GSN).

43. Mr. Montemagno noted in a separate “Considerations/Concerns” section of the July 22 memorandum that:

removal of GSN from our system will result in minimal consumer outcry and we can easily withstand that activity. Likely will hear from our older subscriber base which was our experience when we moved from analog to digital. We are not too concerned about our lack of carriage while our competitors continue to offer [GSN].⁸⁶

44. Based on this analysis, Mr. Montemagno presented two options for Mr. Bickham’s consideration: dropping GSN to save _____ in annual programming fees, or retaining GSN in Cablevision’s less-penetrated “Silver” and “Gold” tiers to save approximately _____ in annual programming fees.⁸⁷

45. Mr. Montemagno’s carriage analysis makes no reference to either WE tv or Wedding Central, and no one at Cablevision involved in the GSN carriage decision discussed or otherwise considered the impact of GSN’s carriage on WE tv or Wedding Central.⁸⁸ Nor did anyone at Cablevision involve executives at Rainbow Networks in the GSN retiering decision.⁸⁹

46. Cablevision considered the continued carriage of a number of other networks at the time of the GSN review.⁹⁰ Monthly programming reports from Mr. Montemagno’s team reflect that _____ another network that was out of contract, had

⁸⁶ CV Exh. 119 at 3. Likewise, in a contemporaneous email Mr. Montemagno informed his colleagues of the reaction that a peer MVPD, Mediacom, had gotten when it ceased carrying GSN: “Mediacom dropped it last year and heard barely nothing, but they carried it in digital basic to like 25%, which says that others are tiering it at least.” GSN Exh. 67.

⁸⁷ CV Exh. 119 at 4. Cablevision was not unique among MVPDs in deciding to retier networks with small but relatively loyal audiences. Mr. Chang testified that DIRECTV

⁸⁸ See CV Exh. 119; Tr. 1516:18-1517:9 (Montemagno).

⁸⁹ See Tr. 1516:18-1517:9 (Montemagno).

⁹⁰ CV Exh. 337 ¶¶ 56-58 (Montemagno).

“declared an impasse” in negotiations in July 2010, and that during August and September 2010 Cablevision entered into discussions with [REDACTED] about the upcoming expiration of [REDACTED] carriage agreement.⁹¹ Following these discussions, the programming team reported that

92

47. Cablevision’s programming and senior executive team continued their discussion of GSN carriage at a November 8, 2010 budget meeting. At that meeting, Mr. Rutledge, Mr. Bickham, and Mr. Montemagno discussed anticipated 2011 programming cost increases and considered “what channels might we change our distribution arrangement with to save money.”⁹³ As reflected in Mr. Montemagno’s contemporaneous notes, the discussion included [REDACTED] (all of which were out of contract or had contracts on the verge of expiration), and Mr. Bickham requested that Mr. Montemagno’s team pull STB data and Nielsen ratings data for each network under consideration.⁹⁴ These data once again showed that GSN performed poorly among Cablevision viewers, ranking out of 56 Family tier networks.⁹⁵

48. Following the November 8, 2010 budget meeting, Cablevision decided not

⁹¹ CV Exh. 121B at 1; CV Exh. 121C at 1.

⁹² CV Exh. 121C at 1.

⁹³ Tr. 1517:16–1519:3 (Montemagno); *see also* CV Exh. 136 at 22.

⁹⁴ *See* CV Exh. 136 at 22 (Nov. 2010 meeting notes); *see also* Tr. 1518:7-1522:4 (Montemagno); Joint Exh. 1 at 96:1-5, 96:11-97:1, 105:7-106:16 (Bickham) (discussing Cablevision’s consideration of [REDACTED]).

⁹⁵ CV Exh. 337 ¶ 54 (Montemagno); CV Exh. 154 at 1 (Dec. 16, 2010 email attaching STB and Nielsen data, and stating “I gave Mac our viewership analysis we presented to Tom R. and John a few weeks back (this time specifically highlighting GSN)”); *see also* GSN Exh. 86 (Nov. 10, 2010 email to Adam Weinstein attaching STB data with [REDACTED] highlighted).

to drop GSN entirely but instead to move it to the Sports & Entertainment tier.⁹⁶ Mr. Bickham testified that the decision to retier GSN was “strictly a cost issue” and that Cablevision “saved almost the entire amount of carriage fees that we were paying and we didn’t completely take the programming away.”⁹⁷ An internal Cablevision email reflects that, as of November 23, 2010, Cablevision had determined that GSN would be repositioned on February 1, 2011, and that Cablevision would inform customers of the move in their monthly bills and on-air messaging in the month of December 2010.⁹⁸ Cablevision intended to inform GSN of the decision on December 6, 2010.⁹⁹

49. The same internal memorandum states that Cablevision had decided to drop _____ entirely once its carriage agreement expired on December 31, 2010, and that customer messaging would begin in earnest the following week.¹⁰⁰ Ultimately, however, Cablevision chose not to drop _____ after _____ approached Cablevision and agreed to a nearly _____ rate reduction that saved Cablevision approximately _____ million in annual programming fees.¹⁰¹

50. GSN suggested in its pre-trial filings that Cablevision did not rigorously analyze the decision to retier GSN and that Mr. Bickham made the retiering decision based on

⁹⁶ Tr. 1517:10-15, 1519:23-25 (Montemagno).

⁹⁷ Joint Exh. 1 at 38:8-10, 70:14-24 (Bickham).

⁹⁸ CV Exh. 141 at 3.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Tr. 1520:1-1522:4 (Montemagno); *see also* CV Exh. 121E at 1 (“Completed favorable 4-year Extension through 12/31/2014 at significantly reduced license fees.”).

his occasional viewing of the network and without regard to Mr. Montemagno’s analysis.¹⁰² The weight of the evidence does not support such a conclusion. What the evidence does show is that Mr. Bickham directed Mr. Montemagno to perform a carriage assessment of GSN, and that Cablevision relied on that assessment as the foundation of its business decision to retier GSN. Mr. Bickham testified that, prior to receiving Mr. Montemagno’s memorandum, he was already aware that GSN was “a very weak network . . . that we could drop . . . without losing customers . . .”¹⁰³ As a result, Mr. Montemagno’s carriage analysis did not change Mr. Bickham’s view only because, as he testified, it “reinforced my inclinations.”¹⁰⁴ If dropping or repositioning GSN were a foregone conclusion, as GSN has suggested it was, Mr. Bickham would have had no reason to ask his team to review STB data and conduct further analysis with input from Cablevision’s product and programming groups—steps Mr. Bickham explicitly asked Mr. Montemagno and his team to take.¹⁰⁵ Furthermore, Mr. Montemagno’s notes reflect that Mr. Bickham continued to participate in meetings to discuss the issue, including the meeting in November 2010 in which Mr. Bickham requested STB and Nielsen data for a number of networks Cablevision considered dropping or retiering, including GSN.¹⁰⁶

51. In its pre-trial filings GSN also challenged Cablevision’s use of STB data

¹⁰² See, e.g., GSN Trial Br. at 1 (arguing that “Cablevision’s executives deny having considered . . . [cost-benefit] rationales” while deciding to retier GSN); see also Joint Exh. 1 at 56:22-57:10, 76:3-77:6 (Bickham).

¹⁰³ Joint Exh. 1 at 60:10-14 (Bickham).

¹⁰⁴ Joint Exh. 1 at 60:15-16, 75:7-23, 86:20-87:16 (Bickham).

¹⁰⁵ See CV Exh. 117 (explaining that Mr. Bickham “was interested in know[ing] more about box data”); GSN Exh. 296 (soliciting input from the Cablevision product team).

¹⁰⁶ See, e.g., CV Exh. 136 at 22.

in connection with the decision to retool GSN.¹⁰⁷ But GSN offered nothing to contradict the evidence that Cablevision analyzes and uses STB data in the ordinary course to make all kinds of business decisions, including decisions about programming.¹⁰⁸ Mr. Montemagno explained that he uses

¹⁰⁹ Mr. Chang also testified that

Internal GSN emails also show that in 2010 and 2011, GSN requested and used STB data to analyze its own performance.¹¹¹

52. At trial, GSN suggested that Mr. Montemagno incorporated flawed STB data into his July 2010 carriage analysis because the STB report on which he relied (in which GSN ranked appeared to be based on a smaller sample size than other contemporaneous reports (in which GSN still ranked .¹¹² To the extent some portion of the STB data Mr. Montemagno reviewed used a smaller sample size (albeit still more than households), Mr. Montemagno was not conscious of this at the time he prepared the

¹⁰⁷ See GSN Trial Brief at 26.

¹⁰⁸ CV Exh. 334 ¶¶ 50, 50 n.40 (Orszag).

¹⁰⁹ CV Exh. 337 ¶ 47 (Montemagno). During the same time period, See GSN Exh. 138 at GSN_CVC_00132024.

¹¹⁰ Joint Exh. 2 at 58:11-17 (Chang).

¹¹¹ See CV Exh. 175 (May 2011 email discussing GSN's use of STB data).

¹¹² See, e.g., Tr. 1560:20-1579:3 (Montemagno) (cross-examination suggesting that one of the sets of STB data Cablevision reviewed was based on a sample size of about households); GSN Exh. 68 at 11.

carriage assessment.¹¹³ Mr. Montemagno explained that he “rel[ied] on the information that comes from others” and that he never directed anyone to alter STB data to make GSN’s performance appear worse than it actually was (or knew whether it was even possible to do so).¹¹⁴ Moreover, the record reflects that Mr. Montemagno and other Cablevision executives considered multiple sets of STB and Nielsen ratings data while deciding to retier GSN, including specifically a November 2010 analysis that GSN has not challenged.¹¹⁵ The November 2010 STB data showed that GSN ranked [REDACTED] out of 56 channels reported.¹¹⁶ Thus, whether GSN was ranked [REDACTED], there is no dispute that the record fully supports Cablevision’s conclusion that GSN performed poorly among its subscribers.

53. On December 3, 2010, Mr. Montemagno called Mr. Gillespie to notify him of Cablevision’s decision to drop GSN.¹¹⁷ During this call, Mr. Montemagno “explained the pressures that we were under, particularly at that point in time, retransmission consent leverage that we were facing.”¹¹⁸ He told Mr. Gillespie that the decision to retier GSN was “a move that [Cablevision] needed to do to save cost[s].”¹¹⁹ Although Mr. Gillespie was disappointed, he told

¹¹³ Tr. 1574:2-1575:6 (Montemagno).

¹¹⁴ Tr. 1574:2-8, 1652:4-1653:14 (Montemagno).

¹¹⁵ See, e.g., CV Exh. 117 at 7 (showing GSN ranked [REDACTED] of all networks Cablevision carried); CV Exh. 154 at 5-6 (showing GSN ranked [REDACTED] of 56 networks on Cablevision’s iO Family tier according to Cablevision STB data, and [REDACTED] of 56 networks according to Nielsen prime data). Similarly, the July 2010 STB data GSN used to cross-examine Mr. Montemagno shows that GSN was ranked [REDACTED] among the networks Cablevision carried. See GSN Exh. 68 at 11.

¹¹⁶ CV Exh. 154 at 5.

¹¹⁷ Tr. 1524:5-12 (Montemagno); see also CV Exh. 337 ¶ 64 (Montemagno).

¹¹⁸ Tr. 1524:13-25 (Montemagno); see also CV Exh. 147 (Mr. Montemagno’s notes from Dec. 3, 2010 call with Mr. Gillespie).

¹¹⁹ Joint Exh. 4 at 57:12-19, 58:2-5 (Gillespie).

Mr. Montemagno that he “understood th[e] reasons” for Cablevision’s decision.¹²⁰ Specifically, Mr. Gillespie acknowledged that rising retransmission costs affected carriage decisions.¹²¹ As Mr. Gillespie testified, he disagreed with Cablevision’s decision, but “Tom is . . . a stand-up guy.”¹²² There is no evidence to contradict Mr. Montemagno’s express and credible testimony that Cablevision retiered GSN solely as a means of addressing spiraling programming costs. Nor is there any evidence that the decision had anything to do at all with WE tv or Wedding Central.

54. Cablevision retiered GSN on February 1, 2011.¹²³ Mr. Montemagno’s prediction that there would be some customer dissatisfaction with the decision proved true: in the immediate aftermath of the retiering, Cablevision received approximately customer calls complaining about the retiering.¹²⁴ Despite the complaints, Cablevision did not reverse the decision to retier GSN because, as Mr. Montemagno testified, “[w]e thought we made a very sound business decision, and that was going to save us The calls that we did get, they went away in a few days. They were a blip, and they kind of dissipated and went away.”¹²⁵ This is consistent with the findings of both Cablevision and GSN’s experts, who identified no statistically significant loss of customers (known as “churn” in

¹²⁰ Tr. 1524:20-22 (Montemagno).

¹²¹ CV Exh. 146.

¹²² Joint Exh. 4 at 62:4-8 (Gillespie); *see also* Tr. 689:10-18 (Hopkins) (testimony from Dale Hopkins that she had known Mr. Montemagno for 20 years and he was a very “honest and straightforward person”).

¹²³ Tr. 1525:9-11 (Montemagno); CV Exh. 141 at 3.

¹²⁴ *See* Tr. 1626:14-20 (Montemagno). GSN suggested during the hearing that the volume of calls was significant relative to prior Cablevision programming disputes, including the FOX blackout. As Mr. Montemagno explained, however, Cablevision devoted extensive effort to limiting call volume during the FOX dispute, which it did not do here. *See* Tr. 1624:22-1625:20.

¹²⁵ Tr. 1525:21-1526:2 (Montemagno); *see also* CV Exh. 337 ¶¶ 70-73 (Montemagno).

the cable industry) as a result of the retiering.¹²⁶ Moreover, although Cablevision provided _____ to _____ complaining customers, it did so only after it had received its highest call volume and the number of daily complaints dropped off.¹²⁷ Of those customers who received the subsidy, _____ remained Cablevision customers for years after the subsidy expired, and the majority of those customers still subscribe to the Sports & Entertainment tier.¹²⁸ These customer retention numbers demonstrate that Cablevision's decision to retier GSN made good business sense.

B. Cablevision's Decision to Retier GSN Was Not a Pretextual Tactic Designed to Obtain Additional Carriage of Wedding Central

55. Although Cablevision considered a range of information while deciding to retier GSN, the record is crystal clear that Cablevision did not consider the impact of any GSN retiering on WE tv or Wedding Central. Mr. Bickham testified that the retiering discussions within Cablevision were not "linked in any way to" WE tv or Wedding Central.¹²⁹ Mr. Montemagno similarly confirmed that no one at Cablevision discussed the impact of retiering GSN on WE tv or Wedding Central prior to making the decision to drop GSN.¹³⁰ Cablevision's

¹²⁶ Tr. 2559:14-2560:11, 2562:5-2563:4 (Orszag) (explaining that he found no evidence that subscribers churned as a result of the retiering at an acceptable statistical confidence level of 10% or lower, and explaining that Dr. Singer's estimate of churn was above the accepted statistical confidence level); Tr. 1034:10-1040:7 (Singer) (testifying that his estimate of churn is not statistically significant at the 10% level); GSN Exh. 301 ¶ 82 n. 156 (Singer) (taking "no opinion" as to whether his estimate of churn is "statistically significant.").

¹²⁷ GSN Exh. 124 (Feb. 4, 2011 email reflecting that _____ customers called to complain before Cablevision offered the Sports & Entertainment tier subsidy to any customer); *see also* GSN Exh. 129 (Feb. 7, 2011 email to Mr. Bickham stating "GSN volume continues to decline, to date we have received _____ calls in reference to the tier change.").

¹²⁸ CV Exh. 337 ¶ 73 (Montemagno).

¹²⁹ Joint Exh. 1 at 205:1-206:3 (Bickham).

¹³⁰ Tr. 1527:12-1528:3 (Montemagno); *see also* CV Exh. 337 ¶¶ 60-61 (Montemagno).

affiliated networks were “[a]bsolutely not” a factor in the decision to retier GSN.¹³¹

Cablevision’s CEO, Mr. Dolan, did not learn of the decision to retier GSN until senior executives at Sony contacted him about it in mid-December 2010, weeks after Cablevision had informed its customers and GSN itself that GSN would be repositioned.¹³²

56. Likewise, no witnesses from Rainbow Networks or WE tv testified that they were consulted about or had any involvement in Cablevision’s independent business decision to retier GSN. Mr. Broussard, AMC Networks’ President of Distribution, testified that he had no role in the decision, which he learned of only after Mr. Chang reached out to Cablevision on behalf of DIRECTV after the retiering.¹³³ Ms. Martin, President and General Manager of WE tv, testified that she learned about the GSN retiering from Mr. Broussard following Mr. Chang’s outreach.¹³⁴ And Ms. Dorée, Senior Vice President, Programming Strategy & Acquisitions for WE tv, “was not involved in any way in Cablevision’s decision to retier GSN,” and “had no discussion at all with anyone at Cablevision concerning that decision.”¹³⁵

57. If anything, far from helping WE tv, Cablevision made carriage decisions that could have disadvantaged WE tv. On January 1, 2011, it launched the
 , a women's network that WE tv considered a direct competitor and placed in

¹³¹ Tr. 1516:22-1517:9 (Montemagno); *see also* CV Exh. 337 ¶¶ 60-61 (Montemagno).

¹³² Joint Exh. 3 at 76:7-78:23; 79:14-80:8 (Dolan).

¹³³ *See* Tr. 1946:17-1947:8, 1948:24-1949:3, 2045:11-2046:4 (Broussard); *see also* CV Exh. 339 ¶¶ 25-29 (Broussard).

¹³⁴ *See* Joint Exh. 6 at 79:9-80:9, 80:20-83:14 (Martin).

¹³⁵ CV Exh. 338 ¶ 7 (Dorée); *see also* Tr. 1809:5-1811:1 (Dorée) (testifying that she had not reviewed GSN marketing materials, advertising materials, ad sales demographics, or programming schedules prior to this litigation).

its competitive set.¹³⁶ The uncontradicted evidence at trial showed that Cablevision makes carriage decisions, including the decision to retier GSN, without regard for the competition its affiliated networks might face.¹³⁷

58. Nevertheless, GSN contends that Cablevision made a pretextual decision to retier the network for the purpose of gaining leverage for Wedding Central carriage on GSN's parent, DIRECTV. It argues that discussions between Rainbow Networks and DIRECTV occurring after Cablevision communicated its retiering decision to GSN constitutes direct evidence that Cablevision discriminated against GSN based on affiliation. The evidence, however, supports no such conclusion.

59. First, GSN, not Cablevision, initiated the post-retiering discussions between DIRECTV and Rainbow. Although the record contains no evidence that Cablevision had ever linked the carriage of GSN to Wedding Central, there is evidence that GSN had considered such a linkage prior to the retiering decision. Mr. Gillespie testified that he thought of the idea of DIRECTV offering carriage to Wedding Central in exchange for a new carriage agreement between GSN and Cablevision as early as 2009.¹³⁸ Mr. Gillespie shared this idea with Mr. Goldhill.¹³⁹ Mr. Gillespie testified unambiguously that no one at Cablevision ever suggested any trade of GSN for Wedding Central carriage.¹⁴⁰

¹³⁶ CV Exh. 337 ¶ 61 (Montemagno); CV Exh. 121F (Dec. 2010 Cablevision programming report); CV Exh. 170 at 4 (showing [REDACTED] was in WE tv's competitive set).

¹³⁷ CV Exh. 337 ¶¶ 61, 92-93 (Montemagno).

¹³⁸ Joint Exh. 4 at 40:15-41:23 (Gillespie); *see also* CV Exh. 38 at 7.

¹³⁹ Joint Exh. 4 at 42:15-43:9 (Gillespie).

¹⁴⁰ Joint Exh. 4 at 42:6-14 (Gillespie) ("Q. [] Did anyone at Cablevision suggest to you at any time that carrying Wedding Central on DIRECTV would lead Cablevision to enter into a new carriage deal with GSN? A. No. Q. It was your idea? A. Yes."); *Id.* at 44:3-8 ("Q. That idea was never suggested to you by anyone at Cablevision; correct? A. No. Q. Nor was it ever suggested to you by anyone at

60. Mr. Chang similarly testified that Mr. Goldhill raised the idea of DIRECTV participating in a deal between Cablevision and GSN in 2009.¹⁴¹ Those earlier discussions provide important context for why GSN had Mr. Chang, rather than one of its own executives, reach out to Cablevision to see if anything could be done to reverse the GSN carriage decision.¹⁴²

61. Here is what happened: after Mr. Montemagno informed Mr. Gillespie of Cablevision's retiering decision on December 3, 2010, Mr. Goldhill wrote an email to GSN's Management Committee representatives from Sony and DIRECTV to enlist their help in reversing Cablevision's decision.¹⁴³ As a direct result of this email, Mr. Chang contacted Cablevision's Mr. Rutledge to explore whether DIRECTV could help improve the value proposition to Cablevision of entering into a new carriage agreement with GSN.¹⁴⁴

62. The evidence showed that prior to this approach from Mr. Chang, Mr. Rutledge was unaware that DIRECTV even had any ownership interest in GSN.¹⁴⁵ After speaking briefly on December 6, 2010, Mr. Chang and Mr. Rutledge spoke again on December

AMC; correct? A. No, it wasn't."); *accord* Tr. 1527:24-1528:3 (Montemagno); CV Exh. 150 (Mr. Budill describing Mr. Chang's overture to Cablevision after the retiering as "surprising").

¹⁴¹ Joint Exh. 2 at 69:11-70:9 (Chang); *see also* CV Exh. 116 ("Dale mentioned that Kim Martin, President of WE had a meeting recently[] seeking distribution for Wedding TV . . . didn't sound like they got too far according to Dale . . . but we both though it may worth [sic] dusting off the idea we had late last year (below) involving an exchange of DTV distribution for a GSN renewal at higher rates with Cablevision."); Joint Exh. 4 at 40:15-41:23 (Gillespie); CV Exh. 38 at 7; Joint Exh. 2 at 69:11-70:9 (Chang).

¹⁴² Tr. 1630:11-1632:11 (Montemagno); Tr. 1947:2-8 (Broussard); Joint Exh. 2 at 108:20-109:20 (Chang); CV Exh. 850 at 2 (email from Mr. Chang to Mr. Broussard asking if Cablevision could "delay[] [its] decision" on retiering to see if there "is anything else to work out.").

¹⁴³ *See* GSN Exh. 225 (Dec. 3, 2010 email from Mr. Goldhill to GSN Management Committee).

¹⁴⁴ Joint Exh. 4 at 40:15-41:23, 42:15-43:9 (Gillespie); CV Exh. 38 at 7; GSN Exh. 138 at GSN_CVC_00132024; CV Exh. 116.

¹⁴⁵ Tr. 242:13-16 (Goldhill); *see also* GSN Exh. 99.

13, 2010, when Mr. Rutledge suggested, for the first time, that Mr. Chang make contact with Mr. Sapan and Mr. Broussard at Rainbow.¹⁴⁶ As Mr. Broussard testified, he worked regularly with DIRECTV as a business partner, and DIRECTV and the Rainbow Networks had a variety of issues already under discussion.¹⁴⁷ On the other hand, Mr. Montemagno testified that he, as an executive of Cablevision’s distribution arm, “didn’t have a relationship with DIRECTV,” and that “the only relationship that existed with DIRECTV who was making the inquiry was Rainbow Media.”¹⁴⁸ In the end, the discussions between Mr. Chang and Rainbow proved not to be fruitful, as Mr. Chang ultimately conveyed that DIRECTV had no interest in carrying Wedding Central.¹⁴⁹

63. Sony, GSN’s other owner, also initiated discussions with Cablevision concerning GSN carriage.¹⁵⁰ On February 7, 2011, Cablevision, Sony and GSN executives met with Cablevision CEO James Dolan.¹⁵¹ At that meeting, Cablevision expressed interest in three issues that could provide value to Cablevision and potentially reverse the GSN decision:

¹⁴⁶ Joint Exh. 2 at 120:12-126:25 (Chang).

¹⁴⁷ Tr. 1947:9-17 (Broussard).

¹⁴⁸ Tr. 1631:11-1632:4 (Montemagno).

¹⁴⁹ Tr. 1947:25-1950:11 (Broussard).

¹⁵⁰ See Tr. 541:9-542:1 (Goldhill); *see also* CV Exh. 337 ¶ 67 (Montemagno); GSN Exh. 130 (Feb. 9, 2011 email from Mr. Montemagno to Mr. Rutledge et al. re: “Game Show Update,” noting that

); GSN Exh. 138 at

GSN_CVC_00132024-5

¹⁵¹ See GSN Exh. 297 ¶ 21 (Goldhill); CV Exh. 337 ¶ 67 (Montemagno); Tr. 509:5-510:18 (Goldhill) (describing meeting and testifying that

¹⁵² The parties did not discuss Wedding Central carriage.¹⁵³

64. The next day, on February 8, 2011, Mr. Goldhill called Mr. Montemagno to present a new carriage proposal.¹⁵⁴ Under the proposal,

The proposal Sony and GSN presented to Cablevision had nothing to do with Wedding Central.¹⁵⁶ Although Cablevision considered Sony and GSN's proposal, Cablevision ultimately rejected it because it did not provide carriage of GSN.¹⁵⁷ Cablevision's subsequent discussions with Sony likewise failed to lead to an agreement to restore GSN's broader carriage on Cablevision.¹⁵⁸

65. Although the negotiations failed, the evidence shows that Cablevision negotiated in good faith to explore a way to solve its programming cost issue while maintaining broad carriage of GSN. Cablevision did not seek to carry GSN but rather sought

¹⁵² See Tr. 511:14-512:5 (Goldhill).

¹⁵³ See Tr. 540:15-541:8 (Goldhill).

¹⁵⁴ See GSN Exh. 297 ¶ 25 (Goldhill).

¹⁵⁵ See *id.*; see also Tr. 516:7-16, 543:7-14 (Goldhill); Tr. 1529:16-1530:13 (Montemagno) (describing GSN's Feb. 8, 2011 proposal).

¹⁵⁶ See CV Exh. 167 at

¹⁵⁷ See Tr. 1530:18-1531:9 (Montemagno); GSN Exh. 138 at GSN_CVC_00132022. Cablevision wanted to return to a agreement with GSN which it had for the years of their agreement. CV Exh. 337 ¶ 11-12 (Montemagno).

¹⁵⁸ See CV Exh. 337 ¶ 69 (Montemagno).

alternative value that could make carriage

¹⁵⁹ Although GSN has claimed that

Mr.

Montemagno testified that “there are lots of ways to provide value exchange within the context of an agreement and relationship.”¹⁶⁰ It was his understanding that, because Cablevision would have received

66. Although the parties reached an impasse in February of 2011, Mr.

Montemagno told Ms. Hopkins that he was “happy to reconsider” Cablevision’s decision if GSN could improve the value proposition to Cablevision.¹⁶² Ms. Hopkins’s contemporaneous notes of that call demonstrate that the two went on to discuss other options for achieving a deal,

163

67. As Mr. Montemagno testified, there was an additional hurdle to reversing the retiering decision: minimizing any further disruption to Cablevision’s customers by once again moving GSN from one tier to another.¹⁶⁴ Nonetheless, Cablevision would have been willing to restore GSN to broad carriage if the terms were favorable.¹⁶⁵ Mr. Montemagno continued to negotiate with GSN and Sony through April 2011 to attempt to find ways in which

¹⁵⁹ See Tr. 1530:20-1531:19 (Montemagno); Tr. 689:10-690:4 (Hopkins) (recounting conversation with Mr. Montemagno where he explained that

¹⁶⁰ Tr.1634:19-1635:3 (Montemagno).

¹⁶¹ Tr. 1531:13-1531:19 (Montemagno).

¹⁶² Tr. 690:5-19 (Hopkins) (discussing notes from a conversation with Mr. Montemagno where he said he was “happy to reconsider the question of putting GSN on a broader tier.”).

¹⁶³ GSN Exh. 138 at GSN_CVC_00132022-23.

¹⁶⁴ CV Exh. 337 ¶ 68 (Montemagno); Tr. 1531:21-1532:6 (Montemago).

¹⁶⁵ CV Exh. 337 ¶ 68 (Montemagno).

Cablevision could carry GSN on the Family tier, but the parties were never able to reach an agreement.¹⁶⁶ GSN advised Cablevision of its intention to file a carriage complaint on September 26, 2011, and filed its complaint on October 12, 2011.¹⁶⁷

68. In short, the evidence does not support the conclusion that the negotiations were conducted in bad faith. They were simply unsuccessful. The fact that these discussions initiated by GSN did not turn out the way GSN wanted them to does not prove that Cablevision acted with discriminatory intent.¹⁶⁸

V. GSN HAS NOT PROVEN THAT GSN AND WE TV ARE SIMILARLY SITUATED

69. Absent direct evidence of discrimination, GSN resorts to purported circumstantial proof of discrimination. Section 616 and the Commission's rules and precedents make clear what GSN must prove: that it was similarly situated to one of Cablevision's affiliated networks—WE tv or Wedding Central—in February 2011, when Cablevision's retiering decision was executed. Here, GSN has not met its burden of proving that it is similarly situated to WE tv

¹⁶⁶ *Id.* ¶ 69; *see also* CV Exh. 167.

¹⁶⁷ *See* Compl. ¶ 9.

¹⁶⁸ GSN suggested at trial that the present lawsuit is merely a continuation of the negotiations that GSN and Cablevision conducted in 2011 that proved unsuccessful. Specifically, counsel argued that “If they would have read our complaint. If they would have listened to what we said in the depositions. If they would have read our testimony and said, you know what, you’re right. I hope as a rational business actor they would have put us back where we belonged.” Tr. 470:14-23. This is a hollow claim. Cablevision’s business executives are foreclosed from reviewing the vast majority of GSN’s evidence and testimony by the protective order in this case. Moreover, as GSN conceded at a later point in the hearing, the content of any discussions between Cablevision and GSN post-dating GSN’s complaint are not admissible evidence. Tr. 516:25-518:19. In any event, GSN cannot seriously argue that a costly multi-year lawsuit accusing Cablevision of discrimination constitutes a good-faith effort to reach a business solution to the parties’ disagreement.

or Wedding Central under the Commission-identified factors of programming, audience, or advertising.¹⁶⁹

A. GSN and WE tv Do Not Broadcast or Target Similar Programming

70. Any fair reading of the trial record leads to the conclusion that GSN airs game shows and game-related programs that are not similar to the women's-oriented and wedding-centric programming carried on WE tv and Wedding Central.¹⁷⁰

1. GSN and WE tv Promised to Deliver Different Programming in Their Contracts with MVPDs

71. The parties acknowledge their fundamental programming differences in the carriage agreements that WE tv and GSN each signed with numerous MVPDs. Typically, such carriage agreements describe a network's programming content.¹⁷¹ These content descriptions are important because MVPDs want to know what precise programming they are receiving in exchange for the carriage fees they pay.¹⁷² The descriptions are legally binding and MVPDs will hold networks to them.¹⁷³ GSN's Ms. Hopkins agreed that a network's content description is "an important thing for the cable operator."¹⁷⁴

¹⁶⁹ Cablevision notes that, although the following discussion addresses evidence of GSN's post-retiering programming and audience where necessary to respond to GSN's reliance on such evidence at trial, Cablevision continues to view all post-retiering evidence as irrelevant, and respectfully requests that the Presiding Judge give it no weight in his determination.

¹⁷⁰ Since the programming on Wedding Central was limited to a wedding-centric theme, the parties, witnesses and experts focused on dissimilarities in programming between GSN and WE tv. Should the Court determine that GSN and WE tv are dissimilar in programming, the differences with Wedding Central are even more stark.

¹⁷¹ Tr. 1924:4-22 (Broussard); Tr. 626:21-627:12 (Hopkins) ("Q: . . . [I]f you don't deliver what you promise then you can lose your carriage, right? A: They could lose it, right.").

¹⁷² Tr. 1924:17-18 (Broussard).

¹⁷³ Tr. 1924:17-18 (Broussard).

¹⁷⁴ Tr. 626:24-627:7 (Hopkins).

72. Since its launch, GSN has contractually obligated itself to deliver

78

¹⁷⁵ See CV Exh. 2 at 6.

¹⁷⁶ CV Exh. 27 at 26; *see also id.* at 2 (2006 carriage agreement containing identical content description).

¹⁷⁷ CV Exh. 5 at 28; CV Exh. 249 at 3; *see also* CV Exh. 5 at 2

¹⁷⁸ Tr. 626:4-8 (Hopkins). *See also*

73. In contrast, since its relaunch as “WE: Women’s Entertainment” in 2001, WE tv has consistently contractually obligated itself to provide programming to its MVPD partners that is At the time that Cablevision retired GSN and continuing through today, WE tv has contractually obligated itself to provide¹⁷⁹ WE tv’s service descriptions make clear to MVPDs that WE tv is a

181

74. For example, over the years, WE tv has described itself in its carriage agreements

¹⁷⁹ Tr. 1925:3-1927:7 (Broussard).

¹⁸⁰ Tr. 1926:1-3 (Broussard).

¹⁸¹ Tr. 1927:4-7 (Broussard).

¹⁸² CV Exh. 7 at 7, 20, 39.

¹⁸³ CV Exh. 13 at 33; *see also*

75. Excerpted below are the content descriptions GSN and WE tv provided to several of the nation's largest MVPDs, illustrating the clear difference in programming the two networks contractually promised to deliver:

MVPD	GSN	WE
Charter		

MVPD	GSN	WE

2. GSN and WE tv Marketed Different Programming to MVPDs and Other Marketplace Participants

(a) GSN

76. Consistent with the commitments it made in its carriage agreements

GSN promoted itself to its MVPD

partners as a unique game show network.

77. For example, in February 2009 GSN made a presentation to Cablevision stating that GSN is the “only TV network uniquely focused on: classic game show favorites with new original programming.”¹⁹⁷ The presentation highlighted GSN’s “substantial increase in original programming” from 2007 to 2009, listing poker and other game and competition shows in every year.¹⁹⁸

¹⁹⁴ CV Exh. 30 at 7.

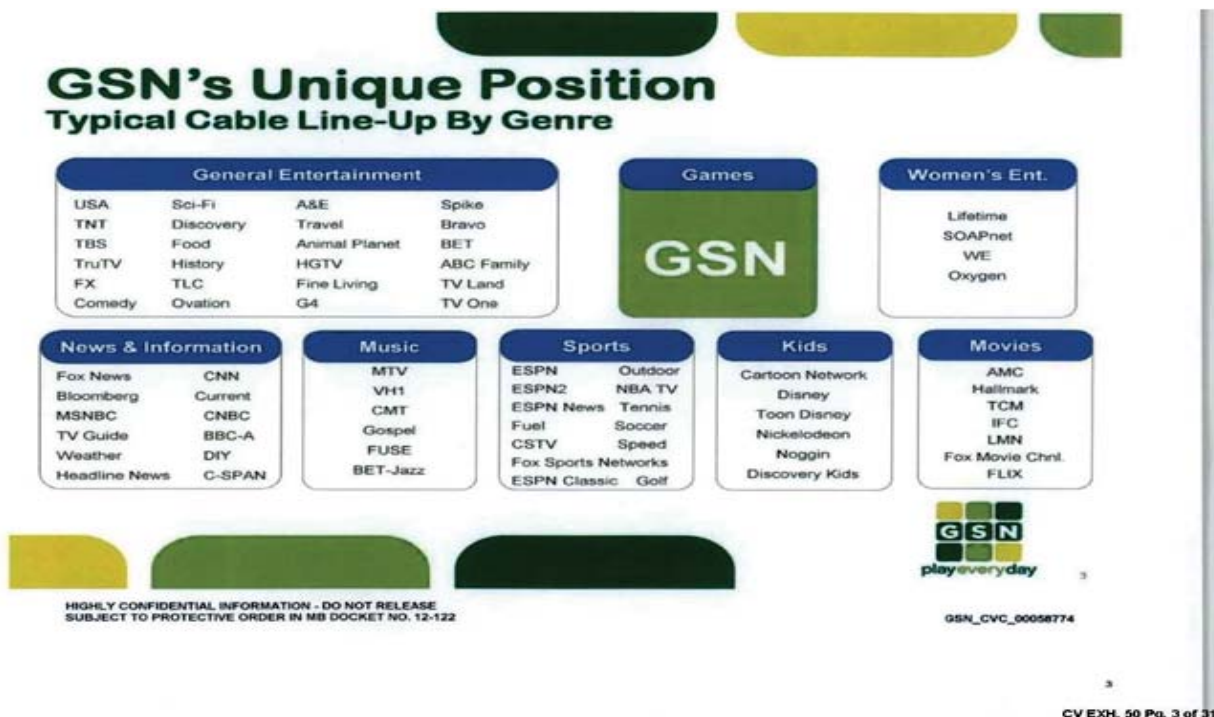
¹⁹⁵ CV Exh. 6 at 1.

¹⁹⁶ CV Exh. 8 at 1-2.

¹⁹⁷ CV Exh. 52 at 2.

¹⁹⁸ *Id.* at 5; Tr. 311:11-15 (Goldhill) (confirming that “there are three shows on the list that are about poker, yes.”)

78. GSN presented the same message to other MVPDs. GSN made a presentation in January 2009 to Comcast, which stated that “GSN is the only TV network devoted exclusively to games.”¹⁹⁹ Its uniqueness was a key theme: GSN provided a chart showing that only GSN focused on game shows, visually distinguishing itself from networks offering different programming, including women’s entertainment networks like Lifetime, Soapnet, WE tv and Oxygen.²⁰⁰



79. The presentation emphasized that “GSN is home to the best game shows, delivering a loyal, broad-based audience. Game shows deliver the largest audience for broadcast

¹⁹⁹ CV Exh. 50 at 2, 30; Tr. 306:7-11, 307:8-23 (Goldhill) (“Q. “GSN is the only network devoted exclusively to games. Do you see that, sir? A. Yes. Q. That was a true statement in 2009, correct? A. Absolutely. Q. In fact, it was a true statement in 2010? A. Absolutely. Q. And a true statement in 2011. A. It’s a true statement up to, I think two months ago. . . . Q. You said until two months ago because a new network named Buzzr has launched, correct? A. Yes, sir.”).

²⁰⁰ CV Exh. 50 at 3; *see also* CV Exh. 37 at 4; CV Exh. 43 at 4; CV Exh. 51 at 3.

networks, and offer family-friendly programming with wide audience appeal.”²⁰¹ The presentation also refers to GSN’s male-centric poker programming that aired on weekends: “Poker Franchises...A popular destination for a loyal audience.”²⁰² In yet another presentation to Comcast, dated January 20, 2010, GSN stated that GSN’s “signature originals and acquired game shows continue to deliver large audiences and offer family friendly programming with wide audience appeal.”²⁰³

80. GSN made a similar presentation in November 2009 to DISH, stating that GSN’s “signature originals and acquired game shows continue to deliver large audiences and offer family-friendly programming with wide audience appeal.”²⁰⁴ GSN’s follow-up presentation to DISH dated June 2010 similarly highlighted that GSN “is the **ONLY** network dedicated to games and the **ONLY** place where audiences come to play every day.”²⁰⁵ The GSN programming discussed is all competitive in nature: *Baggage* is a “new kind of dating game show;” contestants on *Late Night Liars* are competing for \$10,000;²⁰⁶ and an entire slide in the deck is dedicated to GSN’s poker programming.²⁰⁷

81. Indeed, before and at the time of Cablevision’s retiering, poker shows comprised a key part of GSN’s programming strategy, a point GSN made time and again in presentations to industry partners. From 2008 through the fall of 2011, GSN aired poker programming at least one night a week for several hours; it often had poker on the air two nights

²⁰¹ CV Exh. 50 at 4; Tr. 307:8-13 (Goldhill).

²⁰² CV Exh. 50 at 13.

²⁰³ CV Exh. 90 at 5.

²⁰⁴ CV Exh. 81 at 4; Tr. 312:14-22 (Goldhill).

²⁰⁵ CV Exh. 109 at 15 (emphasis in original); *see also* CV Exh. 81 at 10; CV Exh. 90 at 19.

²⁰⁶ CV Exh. 109 at 7.

²⁰⁷ *Id.* at 8; *see also* CV Exh. 90 at 9.

a week for up to 12 hours of poker programming.²⁰⁸ Contrary to GSN's characterizations, these were not late night "infomercials": in March 2011, following the retooling, GSN had poker programming on Saturday and Sunday nights in *prime time* for a combined 13 hours of programming a week.²⁰⁹ In its June 2010 presentation to DISH, GSN trumpeted that "Saturday Night is Poker Night on GSN" and emphasized three different poker programs that GSN aired.²¹⁰ In a document titled "Q3 Programming Highlights" from September 2010, GSN discussed its poker nights in detail.²¹¹

82. GSN consistently featured poker programming in its upfront presentations to its potential advertisers. In Mr. Zaccario's notes for the 2010/2011 upfront, GSN discussed *High Stakes Poker*, saying it was "intensely popular because players [are] using their own stakes; going into its 6th season."²¹² A year later, in March 2011, Mr. Zaccario focused again on GSN's poker programming in his upfront notes. He wrote, "High Stakes Poker has been a staple of our schedule for seven years. Highly regarded as the best poker program on TV."²¹³ Once again,

²⁰⁸ CV Exh. 46 at 2 (Dec. 2008 schedule showing poker two nights a week); CV Exh. 59 at 2 (Mar. 2009 schedule showing GSN aired nine hours of poker programming on Sunday night); CV Exh. 66 at 2 (June 2009 schedule showing GSN aired poker for nine hours on Sunday night); CV Exh. 102 at 2 (Mar. 2010 schedule showing GSN aired nine hours of poker programming on Sunday night); CV Exh. 127 at 2 (Sep. 2010 schedule showing GSN aired nine hours of poker on Saturday and Sunday nights); CV Exh. 137 (Nov. 2010 schedule showing GSN aired 12 hours of poker on Saturday and Sunday nights).

²⁰⁹ CV Exh. 169. GSN only canceled its poker programming after Justice Department action led to GSN's online poker advertisers shuttering their businesses. Tr. 258:9-18 (Goldhill).

²¹⁰ CV Exh. 109 at 8; *see also* CV Exh. 51 at 13 (GSN features "poker franchises . . . A popular destination for a loyal audience"); CV Exh. 96 at 9 (Feb. 2010 presentation to the New York Interconnect featuring *High Stakes Poker* Season 6).

²¹¹ CV Exh. 125 at 1.

²¹² CV Exh. 656 at 9.

²¹³ GSN Exh. 141 at GSN_CVC_00138931.

GSN advertising partners were informed that poker would stay on GSN, with *High Stakes Poker* 7 continuing with a “dynamic new host.”²¹⁴

83. GSN also told potential advertisers and promotional partners, year after year, that its programming uniquely centered on game shows, games, and winning. GSN’s script for its 2010/2011 upfront presentation to advertisers describes what the “GSN TV audience enjoys most: programming, participation and winning: classic game shows 81%, contemporary game shows 75%, new twists on old game shows 63%, opportunities to play along at home 58%.”²¹⁵ In GSN’s 2011/2012 upfront presentation Mr. Zaccario prepared notes stating that the “world needs more winners. It’s hard to argue with that. For GSN, it’s a declaration to our audience. Winning is a core value for us and we celebrate winners everywhere.”²¹⁶

84. At trial, GSN’s executives had little choice but to confirm that GSN was and is a network dedicated to game show programming and competition. Mr. Goldhill testified that throughout the 2009 to 2011 period, GSN was the “only TV network devoted exclusively to games.”²¹⁷ He further testified that even today GSN continues “to use the competitive DNA in

²¹⁴ GSN Exh. 142 at GSN_CVC_00138412. As Mr. Zaccario testified, GSN used its upfront presentations to highlight GSN’s original programming. See GSN Exh. 298 ¶ 5 (Zaccario); see also CV Exh. 332 ¶ 35 (Egan). If, as GSN contends, poker programming was not intended for GSN’s primary audience, GSN cannot explain why it promoted poker shows for all of its advertisers—not just poker advertisers—in upfront presentations every year.

²¹⁵ CV Exh. 656 at 3; see also CV Exh. 125 (GSN’s Q3 programming highlights, focusing on game shows).

²¹⁶ GSN Exh. 141 at GSN_CVC_00138929. The “sizzle reels” GSN played at these upfront presentations to highlight its programming and content for prospective advertisers began with graphic messages like “Play Every Day,” “The Winning Effect,” and “The World Needs More Winners.” CV Exh. 332 at ¶ 55. GSN’s presentations to potential promotional partners carried through GSN’s brand promise. CV Exh. 173 at 7; CV Exh. 613 at 7-8 (presentation discussing the World Needs More Winners initiative); CV Exh. 105 at 7-8 (presentation about potential partnership discussing ways to get GSN viewers involved).

²¹⁷ Tr. 306:9-25 (Goldhill).

absolutely everything we do.”²¹⁸ Mr. Gillespie testified that GSN told its MVPD affiliates that its “games” genre differentiated it from other networks,²¹⁹ and that he never instructed anyone on his distribution team to portray GSN as anything other than a game show network.²²⁰

(b) WE tv

85. WE tv’s programming schedule and promotions could not be more different. As Ms. Dorée testified, “[o]ur entire schedule, from the time we went on the air until the time we went off the air, was programming for women. Programming featuring women or with subjects of interest, specifically with interests to women.”²²¹ She described in detail how WE tv’s programming grid during the 2009-11 period reflected that WE tv filled its schedule with women-oriented programming.²²² She explained how WE tv aired hit original reality shows in the wedding space such as *Bridezillas* and *My Fair Wedding*,²²³ other reality shows called “docu-series” that followed real life women and families,²²⁴ documentaries about women’s lives

²¹⁸ Tr. 307:2-3 (Goldhill). For example, GSN’s recent 2014/2015 upfront presentation to advertisers highlights several programs and describes almost all of them as competition shows with contestants, where there are winners and losers. CV Exh 325 at 2, 4, 5 (describing *Skin Wars* as “This new arced competition show” and *Minute to Win It* as a “fast paced trivia game show,” as well as traditional game shows like *Family Feud*, *The Pyramid*, *The Newlywed Game* and *Catch 21*).

²¹⁹ Joint Exh. 4 at 73:17-75:7 (Gillespie).

²²⁰ Joint Exh. 4 at 80:3-7 (Gillespie) (“Q. Did you ever instruct anyone on your staff that they should not portray GSN as a game show network? A. No. I never instructed anybody not to do that.”). Mr. Gillespie further testified that he has never seen a GSN presentation where GSN was identified as a women’s entertainment network. Joint Exh. 4 at 80:18-23 (Gillespie). GSN did not position itself in the marketplace the way women’s entertainment networks such as Lifetime, Soap, WE tv and Oxygen did. Joint Exh. at 4 76:12-77:2 (Gillespie).

²²¹ Tr. 1702:3-6 (Dorée); *see also* CV Exh. 338 ¶¶ 8-9 (Dorée).

²²² *See generally* Tr. 1702:2-1705:10 (Dorée); CV Exhs. 131, 188 (WE tv’s programming grids for approximately every two months in the October 2009-July 2011 time period).

²²³ Tr. 1702:7-1703:8 (Dorée).

²²⁴ Tr. 1703:9-1704:4 (Dorée).

like *Women Behind Bars*,²²⁵ fictional, scripted shows about women that had aired on other networks like *Golden Girls*, *Ghost Whisperers*, and *Charmed*,²²⁶ and “chick flicks,” which were movies with specific appeal to women.²²⁷

86. WE tv’s presentations to advertisers highlighted its efforts to create and acquire wedding and family-themed programming that appealed to women in its core demographics of 18 to 49 and 25 to 54. Throughout the relevant period, WE tv’s upfront presentations consistently emphasized the network’s attention and focus on programming aimed at a female audience.²²⁸ WE tv told advertisers that it had a “52-week Commitment” to wedding programming and that it “superserved” its audience by giving them more bridal shows than any other network.²²⁹ Shows about weddings and marriage were part of WE tv’s focus on content that “mirrors key turning points in WE tv viewers’ lives,” and were part of a “Programming Family Tree” that also included shows about “babies/kids/teens” and “extended family.”²³⁰ WE tv emphasized to advertisers that its shows could “deliver young loyal women.”²³¹

²²⁵ Tr. 1703:23-25 (Dorée).

²²⁶ Tr. 1704:5-1705:3 (Dorée).

²²⁷ Tr. 1705:4-9 (Dorée); cf. Joint Exh. 5 at 99:1-9 (Goode) (testimony of GSN’s programming executive Ms. Goode that GSN never aired sitcoms, movies, or scripted dramas during her tenure as head of programming).

²²⁸ CV Exh. 42 at 3, 6.

²²⁹ *Id.* at 22 (WE tv 2008 upfront presentation highlighting shows like *My Fair Wedding!*, *Bulging Brides*, *Bridezillas*, *Amazing Wedding Cakes*, and *Platinum Weddings*); CV Exh. 61 at 21 (2009/2010 upfront).

²³⁰ CV Exh. 100 at 14 (WE tv 2010/2011 upfront presentation, highlighting “marriage” shows such as *Bridezillas*, *Platinum Weddings*, and *Girl Meets Gown* and “babies/kids/teens” shows such as *Raising Sextuplets*, *Little Miss Perfect*, and *Downsized*).

²³¹ CV Exh. 168 at 33 (2011/2012 upfront presentation); *see also id.* at 6 (measuring WE tv’s audience in terms of women 18 to 49).

87. WE tv's presentations to its MVPD partners also showcased the network's focus on programming targeted at women. A September 2010 presentation for affiliates featured a WE tv programming calendar promoting shows about weddings, families, and fashion, like *Girl Meets Gown*, *Platinum Weddings*, *You're Wearing that!?*, *My Fair Wedding*, and *Fix My Family*.²³² In a similar March 2011 presentation to Comcast, WE tv stated that its "originals deliver the wild ride during life's defining moments" like "the thrill of getting married," "the drama of family chaos," and "the excitement of second chances."²³³

3. GSN and WE tv Consistently Aired and Targeted Different Programming and Had Different Levels of Programming Expenditures

88. Cablevision's programming expert, Michael Egan, conducted a comprehensive and rigorous comparison of GSN and WE tv programming and related issues. In his testimony, he set out in detail their differences in programming genre, target programming and programming expenditures, all of which led him to conclude that the two networks are not similarly situated in programming.

(a) The Genres of Programming Are Very Different

89. The Commission's regulations explicitly state that genre is a factor to be considered in a similarly situated analysis.²³⁴ Mr. Egan analyzed the genres of programming on WE tv and GSN over the 2009 to mid-2014 period. The results of his analysis confirm that the programming on the networks is not at all similar.²³⁵

²³² CV Exh. 124 at 12.

²³³ CV Exh. 166 at 9.

²³⁴ 47 C.F.R. § 76.1302(d)(3)(iii)(B).

²³⁵ Tr. 2184:15-2186:3 (Egan). Genre is a common concept in the television industry and it is used in television criticism, in programming strategies, in schedules, and in designations found in newspaper

90. Mr. Egan actually did two genre analyses for WE tv and GSN. One covered sample weeks in the period from 2009-2011 and the second covered 2012 through the first half of 2014.²³⁶ Mr. Egan chose one sample week per quarter using a random number generator for a total of 12 sample weeks in the 2009-2011 period and five sample weeks in the later period.²³⁷

91. This method captured a significant portion of the programming that was on both GSN and WE tv during these periods. In the period from 2009-2011, GSN aired 66 unique shows. Since 47 of them appeared in the sample weeks, Mr. Egan evaluated over 70% of GSN's programming.²³⁸ WE tv aired 260 unique titles during this same period and 106 of them were in the sample weeks.²³⁹ After selecting the sample weeks, Mr. Egan and two experienced industry colleagues watched many hours of programming, reviewed web sites, program descriptions, sizzle reels and other information, and classified each show by genre.²⁴⁰

92. These sample weeks show stark differences between the two networks' programming. For example, in December 2010 all of GSN's programming was either game shows or gaming.²⁴¹ In contrast, WE tv had much more varied programming consisting of movies, reality, drama, comedy, news, and documentaries.²⁴² Mr. Egan concluded that between

and magazine listings. CV Exh. 332 ¶ 20 (Egan); Tr. 2187:11-2188:16 (Egan). Common genres are game show, reality, comedy, news, talk, and drama. CV Exh. 332 ¶ 20 (Egan).

²³⁶ CV Exh. 332 ¶¶ 28, 285 (Egan); Tr. 2184:17-2185:3(Egan).

²³⁷ CV Exh. 332 ¶¶ 28, 285 (Egan); Tr. 2184:17-2185:3 (Egan).

²³⁸ CV Exh. 332 ¶ 28 (Egan); Tr. 2185:4-8 (Egan).

²³⁹ CV Exh. 332 ¶ 28 (Egan).

²⁴⁰ Tr. 2185:17-2186:3 (Egan).

²⁴¹ CV Exh. 650 at 1.

²⁴² *Id.* at 2.

2009 and 2011 GSN devoted 98% of its broadcast hours to game shows and gaming, while WE tv aired that programming less than 1% of the time.²⁴³ WE tv dedicated 93% of its broadcast hours to its top five genres of reality, comedy, drama, movie, and news while GSN aired that content in 3% of its hours.²⁴⁴ WE tv devoted 46% of its broadcast hours to the reality genre, while GSN aired that content in less than 1% of its hours.²⁴⁵

93. These stark differences are confirmed in the second genre analysis conducted by Mr. Egan. From 2012 to 2014, GSN devoted 95% of its broadcast hours to game shows; by contrast, WE tv aired no game shows at all.²⁴⁶ Similar to the earlier period, WE tv devoted 98% of its broadcast hours to its top five genres of reality, comedy, drama, movie, and news while GSN aired that content in only 5% of its hours.²⁴⁷

94. Mr. Egan's genre analysis is confirmed by fact witness testimony. According to Ms. Dorée, who was responsible for WE tv's acquired programming during the period, less than 1% of WE tv's program schedule at that time consisted of game or reality competition shows.²⁴⁸ GSN's attempt to dispute her testimony focused entirely on one game show, *Most Popular*, which aired for six episodes in 2009.²⁴⁹ As Ms. Dorée testified, *Most Popular* was "an experiment, and unfortunately it was an experiment that failed pretty

²⁴³ CV Exh. 651; *see also* CV Exh. 332 ¶ 30 (Egan).

²⁴⁴ CV Exh. 332 ¶ 30 (Egan).

²⁴⁵ CV Exh. 651; *see also* CV Exh. 332 ¶ 30 (Egan).

²⁴⁶ CV Exh. 332 ¶ 287 (Egan).

²⁴⁷ *Id.*

²⁴⁸ Tr. 1712:23-25 (Dorée).

²⁴⁹ Tr. 1713:9-17 (Dorée).

miserabl[y].”²⁵⁰ Of the hundreds of seasons of shows that have aired on WE tv since 2001, *Most Popular* was the only game show that the network aired.²⁵¹

95. Mr. Egan’s analysis is further supported by GSN’s own documents. A GSN presentation sent to the network’s incoming head of programming in October 2011 shows that GSN considered genre in the ordinary course of its business and relied on genre distinctions to separate itself from other networks. The presentation lists several programming genres—“Movies,” “Dramas,” “Reality,” “Sit-Coms,” “Forensics,” “News,” “Talk,” and “Game”—and identifies the networks that air content of each type.²⁵² GSN is associated with only one genre of programming, “Games,” while WE tv is associated with “Movies,” “Dramas,” “Reality,” and “Sit-Coms.”²⁵³

96. GSN attempted to undermine Mr. Egan’s analysis by arguing that he did not use standard genre classifications, and by pointing out that certain programming genres may overlap with one another.²⁵⁴ But GSN offered no genre analysis of its own to rebut Mr. Egan and, in the end, GSN’s nitpicking cannot overcome Mr. Egan’s indisputable conclusion that GSN and WE tv air programming in different genres. GSN’s expert, Timothy Brooks, only offered the observation that “genre is not widely used as a decision metric within the industry,”²⁵⁵ a view

²⁵⁰ Tr. 1713:2-17 (Dorée); CV Exh. 338 ¶ 32 (Dorée).

²⁵¹ Tr. 1869:15-1870:1 (Dorée).

²⁵² CV Exh. 615 at 28.

²⁵³ *Id.* This analysis conducted by GSN is entirely consistent with the multiple presentations GSN gave to its MVPD partners illustrating how GSN’s game-related programming set it apart from other networks. *See* CV Exh. 50 at 3; CV Exh. 37 at 4; CV Exh. 43 at 4; CV Exh. 51 at 3; Joint Exh. 5 at 95:10-96:8 (Goode) (GSN programming executive Kelly Goode testified that in December 2009 all GSN shows gave participants an opportunity to win money or something of value).

²⁵⁴ Tr. 2248:1-2249:11 (Egan).

²⁵⁵ GSN Exh. 300 ¶ 96 (Brooks).

that is not supported by fact and runs contrary to the Commission's express recognition that genre is an important part of determining whether two networks are similar.²⁵⁶

97. In fact, prior to being retained by GSN in this matter, Mr. Brooks had written about the differences in the programming on GSN and WE tv. Mr. Brooks is the author of *The Complete Directory to Prime Time Network and Cable TV Shows*, a leading resource in its field in which Mr. Brooks describes the programming of various cable networks.²⁵⁷ The *Complete Directory* describes several networks as women's networks, specifically Oxygen, Lifetime, and WE tv, and highlights their programming targeted at women.²⁵⁸ Mr. Brooks specifically refers to WE tv as "[t]his women's network," that in 2000 "was relaunched as WE: Women's Entertainment, a full-service women's network."²⁵⁹ He then describes shows on WE tv that feature women or are targeted to them, like *Bridezillas*, *Cool Women*, and *Winning Women*.²⁶⁰ Mr. Brooks considers WE tv's shows to span several genres, including movies, documentaries, and reality.²⁶¹ Mr. Brooks's encyclopedia does not identify GSN as a women's

²⁵⁶ Moreover, Mr. Egan conducted his genre analysis in this matter in precisely the same way he did in the *WealthTV* case, where the Presiding Judge credited his testimony. *Herring Broadcast, Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, Recommended Decision, 24 FCC Rcd. 12967, 12977-79 (2009) (hereinafter "*Wealth TV*"). Mr. Egan testified that in the *Tennis Channel* matter he also performed a genre analysis and concluded that the three networks at issue there all showed programming in the sports genre. Tr. 2325:10-2326:7 (Egan). That the Presiding Judge did not credit Mr. Egan's additional detailed analyses on the facts of the *Tennis Channel* case says nothing about the reliability of his testimony here.

²⁵⁷ CV Exh. 816; Tr. 1174:10-1176:4 (Brooks).

²⁵⁸ CV Exh. 816 at 1041, 794, 1477; *see also* Tr. 1178:17-1184:2 (Brooks).

²⁵⁹ CV Exh. 816 at 1477; Tr. 1181:20-1184:2 (Brooks).

²⁶⁰ CV Exh. 816 at 1477.

²⁶¹ *Id.*

network.²⁶² The entry does not mention programming on GSN that is targeted at, or appealing to, women. Instead, it focuses on GSN's game shows.²⁶³

(b) The Target Programming of the Two Networks Is Different

98. Mr. Egan next examined the target programming of the two networks. He testified that target programming is “programming that a network seeks to air to reach its target audience.”²⁶⁴ The target programming of a network is articulated through the subject matter and look and feel of its programming.²⁶⁵ He concluded that the target programming of GSN and WE tv is different.

99. First, Mr. Egan testified that the networks cultivate and target programming dedicated to entirely unrelated subjects. While WE tv's programming “spoke of and to subject matters generally of particular interest to women in the age range most typically associated with marriage and family, 18 to 54,”²⁶⁶ GSN's programming was “regardless of topic . . . built around a contest, and the game was the primary (more often than not, the only) concern.”²⁶⁷

100. Mr. Egan next compared the overall “look and feel” of GSN and WE tv. Look and feel is a common concept in the television industry, recognized both by the Presiding

²⁶² *Id.* at 515; Tr. 1184:3-1187:11 (Brooks).

²⁶³ CV Exh. 816 at 516.

²⁶⁴ Tr. 2197:25-2198:17 (Egan); *see also* CV Exh. 332 ¶ 42 (Egan).

²⁶⁵ CV Exh. 332 ¶ 44 (Egan).

²⁶⁶ *Id.* ¶ 48; *see generally id.* ¶ ¶ 47-50.

²⁶⁷ CV Exh. 332 ¶ 51 (Egan); *see also* Tr. 2199:18-2200:1 (Egan) (“GSN is about contests. It's about games. The subject matter is the game . . . GSN [is] all about games for people who want to play along with the game.”)

Judge in prior decisions, as well as by programming network executives.²⁶⁸ As Mr. Egan explained, it is an element of a network that is “deliberately created by producers and networks.”²⁶⁹ It is “integral to [a network’s] target programming theme and network brand, indicative of its target audience, and [is] a distinguishing element of a network’s programming presentation to its viewer.”²⁷⁰

101. Mr. Egan concluded that the look and feel of GSN and WE tv is not similar.²⁷¹ GSN’s look and feel could be best described as “traditional game show.”²⁷² GSN programming consistently contains elements common to game shows like “an all-powerful emcee; music that often turns dramatic during tense moments . . . theatrical or flashy lighting; fixed place cameras showing a single studio set; and a boisterous audience whose oohs, ahs, and applause let us know its opinions.”²⁷³ Mr. Egan testified that he “did not see an attempt by the network to create a GSN personality separate from the Game Shows.”²⁷⁴

102. In contrast, WE tv’s look and feel “presented a single-minded theme and focus on 18-54 year old women, their relationships, and their families via the shows themselves and the promos in between them.”²⁷⁵ Ms. Dorée confirmed that this was a conscious effort by WE tv to target women 18 to 54. She testified that WE tv would use “words, music, images,

²⁶⁸ Tr. 2200:18-2201:7 (Egan); *see also* CV Exh. 332 ¶ 65 (discussing look and feel at USA Network); *WealthTV*, 24 FCC Rcd. at 12978.

²⁶⁹ Tr. 2200:2-2201:7 (Egan); CV Exh. 332 ¶ 64 (Egan).

²⁷⁰ CV Exh. 332 ¶ 64 (Egan).

²⁷¹ CV Exh. 332 ¶ 66 (Egan), Tr. 2200:11-2201:15 (Egan).

²⁷² CV Exh. 332 ¶ 67 (Egan).

²⁷³ *Id.*

²⁷⁴ *Id.* ¶ 69.

²⁷⁵ *Id.* ¶ 70.

graphics. All things we thought would resonate with women. . . Sizzle reels . . . in those sizzle reels would be compilations of our programs but all wrapped in the brand look and sound and feel.”²⁷⁶ WE tv’s Brand Book confirms Ms. Dorée’s statement.²⁷⁷ The book relates that WE tv is “about the wild ride of modern family life and exploring the defining moments of every woman’s experience.”²⁷⁸

(c) WE tv and GSN Had Different Programming Expenditure Levels

103. Finally, Mr. Egan testified that programming expenditures are helpful in distinguishing networks because they provide insight into the valuations of the cable network’s content by both buyers and sellers in the marketplace.²⁷⁹ Mr. Egan explained that “cable operators and satellite operators, the MVPDs, they really value high quality original programming but it’s very expensive to make . . . So a network that spends more money every year has a greater capability of producing high quality original programming and acquiring already successful off-network programming.”²⁸⁰

104. According to SNL Kagan, an authoritative industry source, WE tv spent more than _____ times the amount spent by GSN on programming in each of 2010 and 2011.²⁸¹ In 2010 and 2011, respectively, GSN spent roughly _____ and _____ on programming, while WE tv spent _____ and _____

²⁷⁶ Tr. 1732:23-1734:5 (Dorée).

²⁷⁷ CV Exh. 227.

²⁷⁸ *Id.* at 5.

²⁷⁹ CV Exh. 332 ¶ 82 (Egan); Tr. 2207:3-2208:24 (Egan).

²⁸⁰ Tr. 2207:19-2208:4 (Egan).

²⁸¹ CV Exh. 332 ¶ 82 (Egan); Tr. 2208:2-8 (Egan).

²⁸² The two networks spent roughly comparable total amounts on original programming, but the cost per hour of original programming on the networks was very different: WE tv spent an average of _____ to produce each hour of original programming; in contrast, GSN spent _____ per hour, approximately _____ less.²⁸³ Principally, the networks made far different investments in acquired programming content, like movies or old game shows.²⁸⁴ GSN spent _____ on programming acquisitions in 2011.²⁸⁵ WE tv spent _____ in 2011 to license its acquired series and movies.²⁸⁶ Due to this significant difference in expenditures, WE tv could purchase original programming that generated a high level of attention among the public and the trade press in a way that added value to the network.²⁸⁷

4. Mr. Poret's Survey Confirms That Viewers Consider the Programming on GSN and WE tv to be Dissimilar

105. The differences between GSN on the one hand and WE tv, on the other, are confirmed by survey evidence introduced by Cablevision. Relying upon well-accepted consumer survey techniques, Cablevision's survey expert, Hal Poret, designed and conducted a survey of television viewers in 2012. The survey powerfully demonstrated that television viewers do not perceive WE tv and GSN to be similar with respect to their programming.²⁸⁸

²⁸² CV Exh. 332 ¶ 82 (Egan).

²⁸³ *Id.* ¶ 86; Tr. 2329:12-2330:23 (Egan).

²⁸⁴ *Id.* ¶ 88.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ CV Exh. 332 ¶ 87 (Egan).

²⁸⁸ Tr. 1401:9-11 (Poret).

106. Mr. Poret conducted his survey by showing participants two channels at a time and asking them to rate the similarity of the channels on a scale of 0 to 10, with 0 being extremely dissimilar and 10 being extremely similar.²⁸⁹ The participants had the option of making no comparison if they lacked sufficient familiarity with the networks to form an opinion.²⁹⁰ The survey asked participants to rate twelve pairs of networks in total, including WE tv and GSN.²⁹¹ Mr. Poret designed the survey to present five pairs of networks that on their face seemed to offer similar programming, including HBO and Cinemax (movie-oriented channels), ABC and CBS (classic broadcast networks), and Lifetime and Oxygen (women's networks). If participants found these pairs to be similar, this would serve as a control validation that the survey was operating properly.²⁹² Similarly, other pairs were designed to be networks that seem to be dissimilar, like CBS and the Science Channel, so that Mr. Poret could assess whether participants would rate these channels as dissimilar.²⁹³ Lastly, the survey had two networks, WE tv and Oxygen, that GSN has claimed are similar in programming.²⁹⁴ By including all these other pairings in his survey, Mr. Poret established benchmarks that would confirm the validity and reliability of the survey results.²⁹⁵

107. There were a total of 870 participants in the survey, including a subgroup of 470 participants who lived in the New York DMA that is served by Cablevision, and 400 participants from a national group that was geographically representative of the rest of the

²⁸⁹ Tr. 1401:14-19 (Poret); CV Exh. 233 ¶ 11 (Poret).

²⁹⁰ Tr. 1401:19-21 (Poret); CV Exh. 233 ¶ 11 (Poret).

²⁹¹ Tr. 1401:22-25 (Poret); CV Exh. 233 ¶ 12 (Poret).

²⁹² Tr. 1409:8-12 (Poret); CV Exh. 233 ¶ 16 (Poret).

²⁹³ Tr. 1409:17-22 (Poret); CV Exh. 233 ¶ 19 (Poret).

²⁹⁴ Tr. 1410:6-14 (Poret); CV Exh. 233 ¶¶ 22-23 (Poret).

²⁹⁵ Tr. 1401:22-25 (Poret), 1409:23-1410:14 (Poret).

country outside the New York DMA.²⁹⁶ The survey participants also included 550 people who receive GSN, 300 people who identified as current watchers of GSN, and 350 people who identified as current watchers of WE tv.²⁹⁷ The participants were selected by using well-accepted marketing survey techniques.²⁹⁸

108. The results of the survey demonstrated that GSN and WE tv are perceived by consumers to be very dissimilar in their programming, with an average similarity rating of 1.32 among the New York DMA sample, which is at the extremely dissimilar end of the 0 to 10 scale.²⁹⁹ GSN and WE tv received an average similarity rating of 1.38 among the national sample, which also reflects a strong lack of similarity.³⁰⁰

109. By contrast, the networks that were included as benchmarks of similarity, such as ABC-CBS and HBO-Cinemax, received average similarity ratings in the 7.5-9 range.³⁰¹ Within that range were the women's networks Lifetime and Oxygen, with similarity ratings of 7.50 and 7.47 in the New York and national samples, respectively.³⁰² And WE tv, when itself paired with another women's network, Oxygen, had average similarity ratings of 7.62 (New York) and 7.56 (national).³⁰³ These ratings prove that the survey worked well and

²⁹⁶ Tr. 1402:2-5, 1402:13-15 (Poret); CV Exh. 233 ¶ 8 (Poret).

²⁹⁷ Tr. 1402:6-9 (Poret).

²⁹⁸ Tr. 1402:23-1403:6 (Poret).

²⁹⁹ Tr. 1413:2-5 (Poret); CV Exh. 233 ¶ 28 (Poret).

³⁰⁰ Tr. 1414:11-14 (Poret); CV Exh. 233 ¶ 29 (Poret).

³⁰¹ Tr. 1412:19-22 (Poret); CV Exh. 233 ¶ 30.

³⁰² CV Exh. 233 ¶ 30 (Poret).

³⁰³ *Id.* ¶ 34.

produced reliable, logical results demonstrating that WE tv and GSN were well down the extremely dissimilar end of the scale.³⁰⁴

110. Mr. Poret's findings were not challenged by any contrary survey evidence. His findings were robust, with no material variation overall among viewers depending on age, gender, geographic region, type of television service or any other factor measured.³⁰⁵

5. The Evidence Showed No Meaningful Competition Between GSN and WE tv for Programming

111. GSN's expert Dr. Singer claimed at trial that GSN and WE tv compete for programming.³⁰⁶ The only support for this claim is evidence that six shows were pitched to both networks.³⁰⁷ As explained by Cablevision's expert Mr. Orszag, this is a meaningless metric of competition.³⁰⁸ Of the six shows that were pitched to both networks, there is no evidence that any of these shows were developed by either network or that either network even expressed any interest in developing the shows.³⁰⁹ More importantly, these six shows are a miniscule fraction of the thousands of pitches that WE tv and GSN received over the same period.³¹⁰ Dr. Singer admitted that he did not know how shows came to be recorded on the pitch log and did not know whether any of these pitches resulted in any negotiations about a show.³¹¹ As the former

³⁰⁴ Tr. 1413:6-18 (Poret).

³⁰⁵ Tr. 1415:18-24 (Poret); CV Exh. 233 ¶ 36 (Poret).

³⁰⁶ GSN Exh. 301 ¶ 4(d) (Singer).

³⁰⁷ *Id.*; Tr. 920:11-921:1 (Singer).

³⁰⁸ CV Exh. 334 ¶ 135 (Orszag); *see also* CV Exh. 332 ¶ 75 (Mr. Egan discussing the miniscule overlap in pitches between the two networks).

³⁰⁹ CV Exh. 334 ¶ 135 (Orszag).

³¹⁰ Tr. 922:5-923:24 (Singer); *see also* CV Exh. 214 (pitch log for WE tv).

³¹¹ Tr. 924:5-24 (Singer).

President of WE tv stated, “[e]verybody pitches everybody everything.”³¹² Six overlapping pitches is not probative evidence that the networks competed for programming.

112. GSN has also pointed to a few crossover or barter promotions that took place between GSN and WE tv as additional evidence that the networks were competitors.³¹³ Between 2009 and 2011 there were only three barter arrangements that were negotiated between the two networks.³¹⁴ To put this number in context, from 2008 through 2012 WE tv engaged in 80 barter deals with roughly 22 different television networks.³¹⁵ Many of the networks with which WE tv had barter arrangements, such as _____ target different audiences and offer different programming than WE tv.³¹⁶ In fact,

_____ With that context, it is clear that the three barter deals between GSN and WE tv cannot support the conclusion that the networks were similarly situated or competing for programming.

113. Additionally, internal GSN documents suggest that GSN

³¹² Joint Exh. 6 at 164:14-18 (Martin).

³¹³ GSN Exh. 303 ¶¶ 10-12 (Hopkins).

³¹⁴ GSN Exh. 148 at 1; Tr. 673:21-674:9 (Hopkins).

³¹⁵ CV Exh. 332 ¶ 79 (Egan); *see also* CV Exh. 152 at 2.

³¹⁶ CV Exh. 332 ¶ 79 (Egan).

³¹⁷ CV Exh. 338 ¶ 30 (Dorée); *see also* Tr. 680:3-9 (Hopkins) (Ms. Hopkins testified that GSN did barter deals with networks not similar to it).

This contemporaneous evidence from GSN is entirely consistent with the testimony Ms. Dorée gave at trial.³¹⁹

B. GSN and WE tv Target and Deliver Different Audiences

114. Faced with overwhelming evidence that WE tv and GSN offered dissimilar programming, GSN primarily argues that it targeted and delivered the same audience of women that WE tv targeted and delivered. The evidence, however, showed that GSN attempted to attract male and female viewers of all ages, while WE tv focused on women 18 to 49 and women 25 to 54. Further, WE tv's target demographic of women between 18 and 54 made up the majority of its actual audience. GSN's actual audience, by contrast, consisted primarily of men and women above the age of 55.

1. GSN and WE tv Targeted Different Audiences

(a) GSN

115. Although GSN contends that its target audience is women 25 to 54, GSN's documents created in the ordinary course of business contradict this position. Those documents show—as GSN's witnesses conceded—that GSN generally targeted all adults who have an interest in games.

116. GSN frequently made presentations to MVPDs in which it updated them on its programming and provided information about its target audience and audience demographics. For example, in a January 2009 presentation to Comcast, GSN defined its viewer

³¹⁸ CV Exh. 403 at 1. According to a member of GSN's advertising team,

³¹⁹ CV Exh. 338 ¶ 30 (Dorée) .

profile in terms of “adult” demographics—that is, men and women—and stated that GSN offered “family-friendly programming with wide audience appeal” that delivered a “loyal, broad-based audience.”³²⁰ So did the presentations GSN gave to Brighthouse, Comcast, DISH, and the New York Interconnect (including Cablevision’s ad sales team), which all defined GSN’s audience as “broad-based.”³²¹ Mr. Gillespie, GSN’s distribution chief until February of 2011 and the individual at GSN responsible for creating and delivering presentations to MVPDs, conceded that GSN marketed itself to these MVPDs as a “broad-based, family oriented service that appealed to an adult audience.”³²² Mr. Gillespie defined “broad-based audience” as an audience of “men and women and of all ages,” not as women alone.³²³

117. Consequently, in many of these presentations GSN portrayed itself as evenly gender-balanced between male and female viewers. In a presentation to DISH in November 2009, GSN highlighted that its viewers were women and men.³²⁴ In its 2010 presentations to the New York Interconnect and to DISH, GSN represented its audience to be women and men.³²⁵

118. GSN’s presentations to potential advertising and promotional partners also emphasized the network’s broad demographic appeal. A presentation titled “2010/2011

³²⁰ CV Exh. 50 at 4, 16.

³²¹ CV Exh. 39 at 32 (Brighthouse); CV Exh. 48 at 30 (Comcast Spotlight); CV Exh. 109 at 15 (DISH); CV Exh. 96 at 19 (NY Interconnect). The New York Interconnect, which is managed by Cablevision, gives advertisers the ability to buy advertising on 70 cable networks in the New York DMA. *See* GSN Exh. 300 ¶ 42 n. 53 (Brooks).

³²² Joint Exh. 4 at 72:19-73:4 (Gillespie).

³²³ Joint Exh. 4 at 73:5-11; 76:12-77:7; Tr. 82:4-14; 92:14-92:25 (Gillespie).

³²⁴ CV Exh. 81 at 7; Tr. 318:24-319:19 (Goldhill); *see also* CV Exh. 90 at 11 (presentation to Comcast Spotlight from January 2010; GSN’s audience is women and men); Tr. 319:19-320:11 (Goldhill).

³²⁵ CV Exh. 96 at 13; CV Exh. 109 at 9; *see also* Tr. 320:13-321:6 (Goldhill).

Partnership Opportunities” stated that GSN viewers are adults 25 to 54 and women 25 to 54.³²⁶ The presentation reports GSN’s growth across “Key Demos” including households, adults 18 to 49, adults 25 to 54, women 18 to 49, and women 25 to 54.³²⁷ The presentation also discusses nine shows and their target audiences.³²⁸ Six of the nine shows have a target audience of adults, while only three target women 25 to 54.³²⁹

119. GSN’s discussion of its broad target audience is reflected in many other presentations made to potential partners.³³⁰ GSN made a presentation to WWE Summer Slam, a professional wrestling program, in April 2010, in which it said GSN lived to entertain adults 25 to 54 and provided an audience profile that focused on all adults 18 to 49 and 25 to 54, not just women.³³¹ GSN made a presentation to the New York Giants football team in October 2009 in which it described its audience profile in terms of people (not women) 18 to 49 and 25 to 54, and described its audience as female, male.³³² GSN’s “one sheets,” created for

³²⁶ CV Exh. 106 at 3.

³²⁷ *Id.* at 5.

³²⁸ *Id.* at 7-15.

³²⁹ *Id.* The shows targeting adults are *Baggage*, *Never Trust a Puppet*, *Catch 21*, *Life at Stake*, *Shafte*, *Vegas 24/7*. The shows targeting women are *The Newlywed Game*, *He Said She Said*, and *GSN Live*. Although GSN has located a few presentations and internal documents identifying the target audience for its programming as women, the weight of the evidence shows these documents to be outliers. Moreover, the vast majority of GSN’s evidence reflecting a female target audience was created after the retiering in support of programs that were developed and launched after the retiering, and consequently should be given no weight by the Presiding Judge. *See, e.g.*, GSN Exh. 142 (Apr. 2011); GSN Exh. 227 (Feb. 2014); GSN Exh. 228 (2013); GSN Exh. 229 (2014); GSN Exh. 230 (May 2013); GSN Exh. 237 (Sep. 2013); GSN Exh. 265 (May 2011); GSN Exh. 268 (Mar. 2011); GSN Exh. 269 (Mar. 2012); GSN Exh. 270 (June/July 2013); GSN Exh. 271 (Jan. 2012); GSN Exh. 272 (June 2012).

³³⁰ CV Exh. 612 at 4 (partnership presentation stating that both adults 25 to 54 and women 25 to 54 were GSN’s target audience); CV Exh. 613 at 3 (partnership presentation to stating that GSN’s target audience is adults 25 to 54 and women 25 to 54).

³³¹ CV Exh. 105 at 3-4.

³³² CV Exh. 77 at 7.

MVPDs to use in advertising sales also, as a rule, show a gender split among GSN viewers,³³³ as does an April 2011 “Network Description” GSN assembled for its MVPD promotional partners.³³⁴

120. GSN’s internal audience tracking is also telling. In its annual Management Committee presentations in the relevant time period, GSN updated its board on viewership trends among

For example, GSN’s Management Committee presentation from December 2010 tracks viewership trends among
³³⁵ The annual Management Committee report from the following year, 2011, similarly reflects GSN’s performance in

³³⁶

121. GSN’s external reporting of both adults and women in the 25 to 54 age group is consistent with the weight of the evidence at trial: although GSN periodically announced its intention to target female viewers, in fact it never targeted only female viewers. GSN always targeted both women and adults (men and women). For example, GSN’s profile with the Cable Advertising Bureau (CAB), the cable industry’s long-standing advertising sales trade organization, states that one of GSN’s target audiences is women 25 to 54, and the other is persons 25 to 54.³³⁷ This is true of GSN’s CAB profiles in 2011 and 2013, both of which GSN

³³³ Tr. 316:21-317:7 (Goldhill). *See, e.g.*, CV Exh. 95 at 1 (GSN Profile from Feb. 2010, } of viewers were women, were men); CV Exh. 197 at 1 (GSN Profile from Jan. 2012, of viewers were women, were men).

³³⁴ CV Exh. 172 (reflecting an audience of women, men).

³³⁵ CV Exh. 143 at 39-41.

³³⁶ CV Exh. 193 at 50, 53.

³³⁷ CV Exh. 332 ¶ 166 (Egan); GSN Exh. 107 at 00132825; GSN Exh. 238 at GSN_CVC_00168051.

introduced into evidence at trial.³³⁸ The external presentations GSN relies on in support of its purported female target audience tell the same story; they consistently list GSN's target viewers as adults 25 to 54 and women 25 to 54.³³⁹ Likewise, in press releases touting the success of GSN's shows a variety of different demographics are mentioned, ranging from adults 18 to 49 to men 25 to 54 to women 25 to 54.³⁴⁰ All of this is consistent with the "broad based" audience consistently pursued by GSN.

122. Finally, GSN's marketing of its long-running block of poker programming is at odds with its litigation claim that it targeted women. GSN featured poker programming on Saturday and Sunday nights during primetime prior to the retiering.³⁴¹ Poker was targeted at, and resonated with, a male audience. As stated in an internal GSN memorandum, "GSN has counter-programmed Sunday nights with Poker Night! Now poker fans (men) have a clear alternative to Desperate Housewives on Sundays."³⁴² GSN touted the high number of male viewers that *High Stakes Poker* attracted. A November 2010 presentation stated that "GSN male viewers love poker! They watch regularly on TV!" and that GSN men watched significantly more poker than the general audience of men who watched poker.³⁴³ GSN trumpeted poker for good reason: the network earned roughly [REDACTED] in advertising dollars from poker

³³⁸ GSN Exh. 107 (2011 CAB profile); GSN Exh. 238 (2013 CAB profile). In contrast, WE tv's CAB profile supports the assertion that it targeted only women. GSN Exh. 418 ¶¶ 27, 27 n. 26.

³³⁹ See, e.g., GSN Exh. 266 at GSN_CVC_00028925 (presentation to Samsonite.com stating "We live to entertain and serve Adults 25-54, Women 25-54"); GSN Exh. 267 at GSN_CVC_00028656 (presentation to Overstock.com stating the same); GSN Exh. 268 at GSN_CVC_00032246 (presentation to Avon stating "We live to entertain and serve W25-54, P25-54").

³⁴⁰ CV Exh. 332 ¶¶ 155-56 (Egan); see also CV Exh. 287 (press release from Apr. 2013 discussing success of shows in people 25 to 54, women 18 to 49, and women 25 to 54).

³⁴¹ CV Exh. 151.

³⁴² CV Exh. 56.

³⁴³ CV Exh. 138 at 9.

advertisers prior to the retiering.³⁴⁴ Although GSN attempts to slough off poker as an “island” in its programming schedule,³⁴⁵ the fact remains that it was a staple of the network’s schedule for more than six years and dominated primetime on two of the seven nights at the time of the retiering decision.³⁴⁶

123. Mr. Egan also conducted a thorough analysis of GSN’s target audience. As he concluded, “[t]he abundant evidence makes it clear that GSN’s primary target audience throughout the relevant period of 2009, 2010, and 2011 was all Adults (also known as “Persons”) 18+ interested in Game Shows and game playing.”³⁴⁷ “[A]ny effort by GSN to target a female demographic was, at most, a distant second place to the broad-based, gender neutral, adult audience it sought to attract to the network overall.”³⁴⁸

(b) WE tv

124. There is little dispute, nor can there be, that WE tv focused intently on attracting and delivering an audience of women 18 to 49 and 25 to 54. Ms. Dorée testified that everything WE tv did, including programming, marketing, and branding, focused on targeting these two female demographics.³⁴⁹ Mr. Broussard—the Rainbow executive responsible for

³⁴⁴ GSN Exh. 174 at 30.

³⁴⁵ Tr. 275:16-18, Tr. 423:2-21 (Goldhill); Tr. 786:11-24 (Zaccario).

³⁴⁶ CV Exh. 12 at 24, 42 (2004 GSN presentation showing poker programming in development); CV Exh. 151 at 2 (showing GSN aired poker programming for six hours per night, two nights per week in Dec. 2010); CV Exh. 187 at 2 (showing that GSN continued to air poker programming as of Sept. 2011).

³⁴⁷ CV Exh. 332 ¶ 152 (Egan); *see generally id.* ¶¶ 152-169.

³⁴⁸ *Id.* ¶ 152.

³⁴⁹ Tr. 1699:14-19, Tr. 1700:14-1702:6, Tr. 1732:20-1734:14 (Dorée). *See also* CV Exh. 91 at 18 (WE tv 2010 Brand Book, stating that “WE tv is for women 18-54 everywhere who want to relate and engage with the entertainment they watch”); CV Exh. 227 at 9 (WE tv 2011 Brand Book, explaining that “WE tv is about real women’s experiences—either you live it or know someone who does”).

“selling” WE tv to MVPDs—described WE tv as a “a women’s network that is focused on and programmed to appeal to women in the age group of 18 to 49 and 25 to 54 and, in fact, is viewed by those demographic groups.”³⁵⁰ He and his colleagues from WE tv emphasized WE tv’s strength of viewership in its target audience of women 18 to 49 and women 25 to 54 in presentations to MVPD distribution partners.³⁵¹ In a presentation prepared in connection with a meeting WE tv was to have with Charter in September 2010, WE tv highlighted its delivery of women 18 to 49 and women 25 to 54.³⁵² Likewise, in a March 2011 presentation to Comcast, WE tv emphasized its growth in women 25 to 54 viewers and its median age of among women viewers.³⁵³ And in its annual upfront presentations WE tv consistently emphasized its ratings strength among women 18 to 49 and women 25 to 54.³⁵⁴

125. WE tv’s regular internal tracking documents show that the network consistently monitored its performance within its target audience. WE tv’s research department prepared “WE tv Fact Sheets” for its ad sales group that predominantly displayed the performance of WE tv in its targeted demographics of women 18 to 49 and 25 to 54.³⁵⁵ WE tv’s management used daily, weekly, and quarterly reports to track its performance versus that of its

³⁵⁰ Tr. 1921:6-11 (Broussard).

³⁵¹ Tr. 1921:12-1923:12 (Broussard).

³⁵² CV Exh. 124 at 5-6.

³⁵³ CV Exh. 166 at 6, 11. The presentation also describes the target audience for Wedding Central: women 18 to 49, with a median age of 35. *Id.* at 17, 20. *See also* CV Exh. 94 at 9 (WE tv presentation titled “The Evolution of WE tv A Ten-Year Retrospective” and tracking WE tv’s viewership among women 25 to 54 between 2002 and 2009).

³⁵⁴ *See* CV Exh. 100 at 4, 31 (2010/2011 upfront in which WE tv told advertisers that 2009 was its best year ever and that the network had the “highest delivery against W 18-49 and 25-54”); CV Exh. 168 at 33 (2011/2012 upfront); Tr. 2203:14-2205:7 (Egan).

³⁵⁵ CV Exh. 338 ¶ 17 (Dorée); *see also* CV Exh. 93.

key competitors in its female target audience demographics.³⁵⁶ WE tv used ratings performance in these demographics in order to meet its revenue goals and as a benchmark and comparison point for deciding which series to renew or drop.³⁵⁷

126. Mr. Egan also evaluated WE tv's programming, promotional and marketing materials, and internal documents. He concluded that "WE tv is remarkably disciplined and laser-focused on women 18 to 49, 25 to 54."³⁵⁸ He found that WE tv "very publicly communicated a single, consistent, and narrow target audience of Women 18–49 and Women 25–54 via its tightly-focused programming, web site, branding, public relations, affiliate sales, and advertising sales efforts."³⁵⁹

2. WE tv and GSN Delivered Different Audiences

127. The audiences that actually viewed GSN and WE tv had meaningfully different demographic profiles. WE tv consistently delivered an audience consisting primarily of women 18 to 49 and 25 to 54. Put another way, women 18 to 49 and 25 to 54 made up the largest group of WE tv viewers. By contrast, the record reflects that GSN did not deliver a core audience of women 18 to 49 and women 25 to 54; in fact, GSN's overall audience has been and continues to be significantly older and more gender-neutral than its purported target, with less than of the GSN audience falling in the two women's demographics that dominate WE tv's viewership.

³⁵⁶ See, e.g. CV Exh 657; CV Exh. 164; CV Exh. 171; Tr. 2212:12-2214:7 (Egan); see also, e.g., CV Exh 306 (review of second quarter 2009 WE tv results for women 18 to 49 and 25 to 54).

³⁵⁷ CV Exh. 338 ¶ 17 (Dorée); CV Exh. 310 at 1; CV Exh. 313.

³⁵⁸ Tr. 2210:23-2211:7 (Egan); CV Exh. 332 ¶ 8 (Egan).

³⁵⁹ CV Exh. 332 ¶ 8 (Egan); Tr. 2210:23-2211:7 (Egan).

128. In a presentation made to GSN in July 2011, Nielsen comprehensively set out GSN's audience composition in primetime (the hours between 7:00 PM and 12:00 AM) during the relevant time period.³⁶⁰ This presentation illustrates in graphic form that during every quarter between the first quarter of 2007 and the second quarter of 2011, women over the age of 55 comprised the largest component of GSN's audience.³⁶¹ This presentation is corroborated by a very similar presentation made by Nielsen in September 2011, roughly three months after its initial presentation.³⁶² Taking one quarter as an example, during the fourth quarter of 2010, immediately prior to GSN's retiering by Cablevision, GSN delivered _____ total viewers in primetime.³⁶³ Of those viewers, _____—or just under _____ of the total—were women 55 and older.³⁶⁴ The next largest component of GSN's total primetime audience during the quarter, with _____ viewers, was men 55 and older.³⁶⁵ Men over the age of 55 comprised approximately _____ of GSN's primetime audience.³⁶⁶ Women 25 to 54, who are allegedly GSN's target demographic and core audience, were only the third-largest demographic group that viewed GSN in primetime; during the fourth quarter of 2010, only _____ of GSN's total audience of _____ viewers were women 25 to 54.³⁶⁷ Thus, during this

³⁶⁰ CV Exh. 314.

³⁶¹ *Id.* at 11.

³⁶² *Compare* CV Exh. 186 at 21

with the identical data presented in CV Exh. 314 at 11.

³⁶³ CV Exh. 314 at 11.

³⁶⁴ CV Exh. 314 at 11; *see* CV Exh. 186 at 22

³⁶⁵ CV Exh. 314 at 11.

³⁶⁶ CV Exh. 186 at 21-22 (reflecting the same viewer numbers as CV Exh. 314, along with percentages).

³⁶⁷ CV Exh. 314 at 11.

sample quarter, GSN's purported target demographic of women 25 to 54 comprised only about of GSN's total primetime audience.³⁶⁸

129. The ratings in the fourth quarter of 2010 were no outlier. Although the actual delivery numbers vary somewhat from quarter to quarter, the Nielsen presentation shows that for a period of years leading up to and after the retiering, women over the age of 55 outnumbered women 25 to 54 in GSN's audience by a factor of , and that the number of men over the age of 55 in GSN's audience was approximately

.³⁶⁹ These primetime data are consistent with GSN's viewership during the total day as well.³⁷⁰ For example, women over the age of 55 made up of GSN's viewers in the fourth quarter of 2010, men over the age of 55 were of its viewers, and women 25 to 54 were only of its viewers.³⁷¹ When presented with the July 2011 Nielsen study at trial, Mr. Goldhill acknowledged that GSN's total day ratings also showed, throughout his tenure at the network, that women 55 and older constituted the largest part of GSN's audience.³⁷²

130. Mr. Goldhill further conceded that GSN's viewers aged 25 to 54—its alleged target age range—were divided roughly equally between women and men during the relevant time period.³⁷³ The Nielsen data bear this out: they show that, in the four years prior to

³⁶⁸ CV Exh. 186 at 21-22.

³⁶⁹ CV Exh. 314 at 11; CV Exh. 186 at 21.

³⁷⁰ CV Exh. 186 at 23-24.

³⁷¹ *Id.* at 24.

Id.

³⁷² Tr. 371:12-18 (Goldhill).

³⁷³ Tr. 364:5-365:2 (at the beginning of 2009, GSN's primetime audience among people 25 to 54 was essentially men and women), Tr. 366:13-21 (in the fourth quarter of 2010, GSN's

the retiering, GSN had a female skew of [REDACTED] or more among viewers age 25 to 54 only twice, at the end of 2007 and beginning of 2008.³⁷⁴ GSN's contention that it skews significantly female in its target age demographic of viewers 25 to 54 is at odds with the facts.

131. Additional Nielsen data introduced at trial shows that GSN consistently had a median viewer age [REDACTED] meaning that [REDACTED] of GSN's actual audience was consistently older than the target audience GSN has identified in this litigation. The Nielsen presentation given to GSN in 2011 shows that at no time between the first quarter of 2007 and the second quarter of 2011 did GSN's median age drop below [REDACTED] years of age (in the first quarter of 2008) during primetime viewing; in the months leading up to the retiering, during the third and fourth quarter 2010, GSN's median age was [REDACTED] years of age or more.³⁷⁵

132. GSN itself created internal "Viewer Profiles" in the ordinary course of business that reached the same conclusion. These documents showed its median viewer age at [REDACTED] as of October 2010, and [REDACTED] as of June 2011.³⁷⁶ And these viewer profiles confirm that people over the age of 55 made up the overwhelming majority of GSN's overall audience; 55 and older viewers comprised [REDACTED] of GSN viewers as of October 2010 and [REDACTED] of viewers as of June 2011.³⁷⁷ The latest-dated viewer profile entered into evidence at trial, created in October 2011, confirms that in every year and quarter between 2007 and 2011 GSN's

primetime audience of people 25 to 54 was [REDACTED] male/female), Tr. 366:23-367:11 (in March 2011, GSN's prime time audience of people 25 to 54 was [REDACTED] male/female) (Goldhill).

³⁷⁴ CV Exh. 314 at 5; Tr. 369:8-18 (Goldhill); *see also* CV Exh. 334 ¶ 105, Table 16 (Orszag) (showing that GSN's "Female share of viewership (age 25-54)" was [REDACTED] during the fourth quarter of 2010).

³⁷⁵ CV Exh. 314 at 12.

³⁷⁶ CV Exh. 815 at 1; CV Exh. 615 at 11.

³⁷⁷ CV Exh. 815 at 1; CV Exh. 615 at 11.

audience of women 55 and older outnumbered its audience of women 25 to 54 by a factor of at

and by the time of the retiering, by a factor of ³⁷⁸

Between 2009 and 2010, women over the age of 55 were never less than of GSN's

total adult audience.³⁷⁹

133. WE tv's ordinary course documents, which incorporate the same types of Nielsen data used by GSN, tell a much different story. For example, WE tv's regularly-generated "Where WE Are" ratings report for the fourth quarter of 2010 shows that WE tv had an average primetime audience of women 25 to 54—approximately two and a half times as many viewers in this demographic as GSN's ³⁸⁰ Women 25 to 54 made up approximately of WE tv's total viewership of people.³⁸¹ This is almost the concentration of viewers GSN had in this demographic, where women 25 to 54 were only of GSN's total primetime audience during the fourth quarter 2010.³⁸²

The results for WE tv's fourth quarter 2010 were consistent with its delivery of a women 25 to 54 audience in prior periods.³⁸³ Likewise, WE tv's "Fact Sheets" prepared for its advertising sales department show that WE tv consistently had a high percentage of its total audience in the

³⁷⁸ CV Exh. 615 at 14.

³⁷⁹ See CV Exh. 819.

³⁸⁰ Compare CV Exh. 156 at 3 with CV Exh. 314 at 11.

³⁸¹ CV Exh. 156 at 3

³⁸² CV Exh. 314 at 11

³⁸³ See CV Exh. 156 at 3 (showing that WE tv's average women 25 to 54 audience for the year 2010 was out of a total of viewers, and average women 25 to 54 audience for the year 2009 was out of a total audience of see also CV Exh. 86 at 4 (showing data for 2008)).

women 18 to 49 and women 25 to 54 demographics—indeed, or more—as measured in terms of VPVH, or “viewers per viewing household.”³⁸⁴

134. Moreover, WE tv’s internal viewer profiles consistently show that WE tv’s audience during the relevant period had a median age among women that was squarely within its target demographics: among primetime female viewers in 2009 and 2010, respectively, and among total day female viewers.³⁸⁵ By the second quarter of 2011, WE tv’s median age among women was even lower: during primetime and average across the entire day.³⁸⁶

135. At trial, GSN’s experts suggested that GSN and WE tv have similar audience profiles because both of them have an adult viewership (over age 18) that is more female than male. That comparison is simply too general to have any meaning in comparing the similarity of the two networks. First, television as a whole skews female.³⁸⁷ Therefore, the fact that both WE tv and GSN have audiences that skew female does not mean that they attract the same audience or are similar. For example, both the History Channel and ESPN have a high share of male viewership.³⁸⁸ But this overlap in male viewership is not evidence that viewers consider the History Channel to be a substitute for ESPN, or that the networks are similarly

³⁸⁴ See CV Exh. 93 at 1

As Cablevision’s advertising expert, Mr. Blasius, explained, VPVH measures the audience of a particular demographic viewing a network as a percentage of the total number of households viewing the network. Tr. 2398:9-23 (Blasius); *see also* Joint Glossary at 5 (defining VPVH).

³⁸⁵ CV Exh. 93 at 1, 5; *see also* CV Exh. 156 at 3.

³⁸⁶ CV Exh. 93 at 9.

³⁸⁷ Tr. 1744:4-10 (majority of cable networks are watched by women) (Dorée); CV Exh. 332 ¶ 203 (Egan).

³⁸⁸ CV Exh. 334 ¶ 91 (Orszag).

situated.³⁸⁹ Second, advertisers' primary focus is on the age ranges 18 to 49 and 25 to 54 when they are choosing networks on which to advertise.³⁹⁰ Comparing the networks on the basis of a broad demographic range such as "women over the age of 18" is not anything that an experienced market participant would do.³⁹¹

136. GSN's comparison of the networks' 18 and older audiences intentionally obscures the fact that WE tv's adult female audience was significantly younger than GSN's.³⁹² For example, in 2009 only [REDACTED] of GSN's adult viewers were women aged 25 to 54, while [REDACTED] of WE tv's adult viewers were women aged 25 to 54.³⁹³ The same general trend held true in 2010, when [REDACTED] of GSN's adult viewers were women 25 to 54, and [REDACTED] of WE tv's were.³⁹⁴ With such small percentage of its viewership coming from women 25 to 54, the bulk of GSN's viewers must either be men, or be women above the age of 55—demographics that are outside of GSN's purported target audience.³⁹⁵

137. Mr. Orszag, Cablevision's expert economist, conducted a thorough and detailed analysis of GSN and WE tv's viewership. In addition to confirming the age difference in the networks' viewership, he reviewed demographic information such as household income,

³⁸⁹ *Id.*

³⁹⁰ *See* Tr. 1207:6-1208:9 (Brooks); Tr. 2392:12-21 (Blasius).

³⁹¹ *See* CV Exh. 228 ¶¶ 41, 44 (Blasius).

³⁹² *See* CV Exh. 806 at 6-7; CV Exh. 820A.

³⁹³ CV Exh. 820A.

³⁹⁴ *Id.*

³⁹⁵ Mr. Egan confirmed this analysis with ratings from the New York DMA, which showed that [REDACTED] of WE tv's audience was women between 18 and 54 in 2010, while only [REDACTED] of GSN's audience was in that demographic. Tr. 2218:19-2219:20 (Egan); CV Exh. 652; CV Exh. 332 ¶¶ 193-197 (Egan). Over [REDACTED] of GSN's audience was over the age of 55, and almost [REDACTED] was over the age of 65. Tr. 2218:19-2219:20 (Egan); CV Exh. 652; CV Exh. 332 ¶¶ 193-197 (Egan).

education levels, and geographic information for GSN and WE tv viewers.³⁹⁶ He compared the WE tv and GSN viewer demographics to those of 93 other cable networks for which data were available, and concluded that the demographic differences between the two networks were substantial.³⁹⁷ No evidence offered by GSN contradicted Mr. Orszag's conclusions.

138. Mr. Orszag also conducted a "distance analysis" using data to assess the demographic similarity of the two networks. His distance analysis, similar to the one conducted by GSN's expert, uses demographic information in a statistical model to determine how "close" WE tv and GSN are in relation to each other.³⁹⁸ The distance analysis Mr. Orszag performed confirms that GSN is not similar to WE tv. Mr. Orszag's distance analysis includes ten different demographic variables.³⁹⁹ The results of Mr. Orszag's distance analysis show that the distance between WE tv and GSN was .⁴⁰⁰ To put this number in context, the distance between WE tv and Lifetime, which was closest to WE in distance, was a ⁴⁰¹ GSN ranked

³⁹⁶ CV Exh. 334 ¶¶ 102-107, Table 16 (Orszag)

; Tr. 2544:17-2545:25 (Orszag).

³⁹⁷ CV Exh. 334 ¶¶ 106-107 (Orszag); CV Exh. 335 at 36-65 (Orszag).

³⁹⁸ Tr. 2546:14-2547:25 (Orszag); CV Exh. 334 ¶ 108 (Orszag).

³⁹⁹ CV Exh. 334 ¶ 108 (Orszag). These include (1) viewer median age; (2) female share of viewership; (3) median viewer income; (4) viewer household home ownership share; (5) viewer head of household white collar occupation share; (6) viewer head of household not in labor force share; (7) viewer head of household with at least four years of college share; (8) share of viewers who reside in counties of size A; (9) share of viewership by viewer households with at least three people; and (10) viewer head of household white share.

⁴⁰⁰ *Id.* ¶ 109 .

⁴⁰¹ *Id.* That is, there were networks that were demographically "closer" to WE tv than GSN was.

among the networks in viewer demographic distance from WE tv, and WE tv ranked in viewer demographic distance from GSN.⁴⁰²

139. Dr. Singer's competing distance analysis is flawed. Dr. Singer's distance analysis omits important demographic characteristics such as viewer age, median viewer income, and the share of viewers who reside in urban (or rural) counties.⁴⁰³ These variables, especially viewer age, reveal important differences between GSN and WE tv that significantly impact the distance analysis.⁴⁰⁴ In addition to these omitted variables, Dr. Singer's analysis does not have sufficient data points for each of the metrics he considers in his distance analysis from 2006 to 2010.⁴⁰⁵ Because Dr. Singer includes networks where there are inadequate data, the sample is unbalanced.⁴⁰⁶ An unbalanced sample overestimates the distance between GSN and the other networks; it is not reliable.⁴⁰⁷

140. Against this avalanche of evidence showing the fundamental differences in the target and actual audiences of GSN and WE tv, GSN points to a handful of programs apparently targeted at women 25 to 54. Two of these programs, *Love Triangle* and *Carnie Wilson: Unstapled*, were canceled after just one season.⁴⁰⁸ A number of others were launched after the retiering decision.⁴⁰⁹ In the end, a few shows targeted at the same demographic that

⁴⁰² *Id.* ¶ 108; Tr. 2456:21-24 (Orszag).

⁴⁰³ CV Exh. 334, ¶¶ 113, 201-203 (Orszag); Tr. 2548:9-2549:3 (Orszag).

⁴⁰⁴ CV Exh. 334 ¶ 202 (Orszag); *see supra* ¶¶ 130-32, 134.

⁴⁰⁵ CV Exh. 334 ¶ 203 (Orszag).

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ GSN Exh. 297 at ¶7 (Goldhill); CV Exh. 143 at 35; CV Exh. 193 at 49.

⁴⁰⁹ For example, *Skin Wars*, with a primary target audience of adults 18 to 49 and a secondary target of women 18 to 49, premiered in 2014. GSN Exh. 229 at GSN_CVC_00165526; CV Exh. 291. *Mind of a Man*, which purportedly has a target audience of women 25 to 54 and women 25 to 49, premiered in

WE tv targeted with the entirety of its programming does not make these fundamentally dissimilar networks similar.⁴¹⁰

C. GSN and WE tv Do Not Compete Meaningfully for Advertisers

141. These demographic differences between GSN and WE tv matter to advertisers. Cablevision's advertising expert, Larry Blasius, testified that real-world advertising buyers would not perceive the networks as similar because of key demographic differences, including the networks' ratings, concentration of viewership in the target demographics, and median age. Mr. Blasius spent twenty-eight years as a national broadcast buyer of national television advertising and purchased billions of dollars' worth of advertising.⁴¹¹ During his tenure at several large advertising agencies, he purchased advertising on behalf of clients like Mattel, Frito-Lay, Mazda Motors, Levi Strauss, and Pepsi Cola, among others.⁴¹² Relying on his real-world background (which stands in stark contrast to GSN's experts, who have never bought or sold advertising on a cable television network), Mr. Blasius determined that the networks are significantly different from an advertiser's perspective.⁴¹³

January 2014. GSN Exh. 227 at GSN_CVC_00165271; *see also* CV Exh. 291. *It Takes a Church* also premiered in 2014. CV Exh. 291.

⁴¹⁰ Program-specific Nielsen ratings demonstrate that GSN's alleged flagship programming for younger women had the same audience profile as the rest of GSN's schedule: women 55 and older. A November 2010 "GSN YTD Program Ranker" discussed at trial showed that, as of that date, *Baggage*, *The Newlywed Game*, and *Family Feud* were all viewed by approximately as many women 55 and older as women 25 to 54. CV Exh. 815 at 5; Tr. 1250:12-1251:23 (Brooks). *Baggage* was watched by approximately as many men 55 and older as by women 25 to 54. *Id.* A June 2011 "GSN YTD Program Ranker" confirms that these programs counted women 25 to 54 as a small part of their overall audience. CV Exh. 615 at 18.

⁴¹¹ Tr. 2383:14-17 (Blasius), 2387:6-8 (Blasius); CV Exh. 201.

⁴¹² Tr. 2386:13-20 (Blasius).

⁴¹³ CV Exh. 228 ¶¶ 1-2 (Blasius).

142. As Mr. Blasius explained, GSN and WE tv would be viewed differently by advertisers because of the differences in their Nielsen ratings. Nielsen ratings are the currency of the advertising business.⁴¹⁴ WE tv delivers a higher number of viewers than GSN in its target demographics of women 18 to 49 and women 25 to 54.⁴¹⁵ This makes WE tv more attractive to advertisers seeking to target those demographics. For example, in primetime for the 2009-2010 broadcast year, GSN delivered a rating among women 25 to 54 while WE tv delivered a rating in the same demographic.⁴¹⁶ These ratings translate into a substantial difference in the actual number of women 25 to 54 being delivered. GSN's rating is equivalent to women 25 to 54, whereas WE tv delivered women 25 to 54.⁴¹⁷ An advertising buyer would consider these differences in viewership to be significant.⁴¹⁸

143. GSN's own advertising chief, Mr. Zaccario, acknowledged the importance of Nielsen ratings in driving advertising sales. In an email memo from January 5, 2012, Mr. Zaccario reflected back on GSN's advertising sales performance for 2011.⁴¹⁹ His email stated that "TV missed by nearly dollars. Over of that miss is attributable to ratings performance. I'm not happy about missing and missing that big, but the poor ratings killed us."⁴²⁰

144. Mr. Blasius further testified that advertisers would find it important that

⁴¹⁴ Tr. 2394:5-7(Blasius).

⁴¹⁵ CV Exh. 228 ¶ 30 (Blasius).

⁴¹⁶ CV Exh. 762; Tr. 2393:2-7 (Blasius).

⁴¹⁷ Tr. 2394:8-14 (Blasius); *see also* CV Exh. 762.

⁴¹⁸ Tr. 2394:15-17 (Blasius); *see also* CV Exh. 228 ¶ 30 (Blasius).

⁴¹⁹ CV Exh. 502, Tr. 804:18-806:23 (Zaccario).

⁴²⁰ CV Exh. 502.

GSN and WE tv differed meaningfully in their ability to deliver an audience concentrated in the target demographics. Specifically, Mr. Blasius explained that advertisers use one such measure of audience concentration, a Nielsen-reported “viewers per viewing household” (“VPVH”) metric, in the normal course of business when choosing to purchase advertising time on television networks.⁴²¹ VPVH shows the concentration of a network’s viewers in a particular demographic, such as women 25 to 54, as compared to the network’s entire household audience.⁴²² During the 2009-2010 television season that Mr. Blasius studied, GSN had a VPVH of [REDACTED] in the women 25 to 54 demographic during primetime, while WE tv had a VPVH more than [REDACTED] as high, at [REDACTED].⁴²³ What this means is that WE tv consistently delivered more than [REDACTED] GSN’s concentration of women 18 to 49 and women 25 to 54.⁴²⁴ This difference is significant to advertisers, who view any audience outside of their target demographic as essentially wasted impressions; advertisers are always trying to maximize the proportion of total audience comprised of viewers in their target demographics.⁴²⁵

145. Mr. Blasius also calculated GSN’s and WE tv’s concentration of audience in the target demographics as a percentage of total individual viewers, another exercise that advertisers regularly undertake when choosing whether to purchase time on a particular television network.⁴²⁶ GSN’s audience had a significantly lower concentration of women 18 to

⁴²¹ Tr. 2417:6-9, Tr. 2398:24-2399:5 (Blasius).

⁴²² Tr. 2398:16-23, Tr. 2399:6-10 (Blasius).

⁴²³ CV Exh. 762. The same holds true for women 18 to 49, where GSN had a VPVH of [REDACTED] and WE tv had a VPVH more than [REDACTED] as high at [REDACTED]. *Id.*

⁴²⁴ CV Exh. 228 ¶¶ 30-31 (Blasius).

⁴²⁵ Tr. 2399:11-2400:7 (Blasius); CV Exh. 228 ¶¶ 27-28 (Blasius).

⁴²⁶ CV Exh. 228 ¶ 33 (Blasius); CV Exh. 763; Tr. 2417:10-14 (Blasius).

49 and women 25 to 54 than WE tv's audience.⁴²⁷ For example, during the relevant period, [REDACTED] of GSN's primetime audience was women 25 to 54, but [REDACTED] of WE's primetime audience was women 25 to 54.⁴²⁸

146. Advertisers also measure a network's audience concentration in a target demographic by translating it to an "index" number comparing the network's viewership to the concentration of that demographic in total U.S. television households.⁴²⁹ The data here show that, compared to the U.S. population as a whole, GSN delivers fewer viewers than would be expected in the target demographics and WE tv delivers far more. For example, during the 2009-2010 broadcast year, women 25 to 54 made up approximately [REDACTED] of the U.S. television audience.⁴³⁰ Women 25 to 54 accounted for [REDACTED] of WE tv's audience in primetime, and only [REDACTED] of GSN's, meaning that WE tv "over-indexes" in women 25 to 54—with an index number of [REDACTED]—while GSN "under-indexes" in women 25 to 54—with an index number of only [REDACTED].⁴³¹

147. The female viewership demographics in which GSN over-indexes are, unsurprisingly, the oldest ones. For example, among women 65 and older GSN had an index number of [REDACTED], meaning that GSN delivered a concentration of women 65 and older that was [REDACTED] times higher than the concentration of that audience in the total U.S. television viewing population.⁴³² By comparison, although WE tv also over-indexed among women 65 and

⁴²⁷ CV Exh. 764; Tr. 2413:4-8 (Blasius).

⁴²⁸ CV Exh. 763; Tr. 2409:1-12 (Blasius).

⁴²⁹ CV Exh. 228 ¶ 33 (Blasius); Tr. 2409:15-2411:2, Tr. 2417:15-18 (Blasius).

⁴³⁰ CV Exh. 228 ¶¶ 33-34 (Blasius).

⁴³¹ *Id.* ¶ 37 (Blasius); CV Exh. 764.

⁴³² CV Exh. 764; Tr. 2413:15-2414:5 (Blasius).

older, it did so at a much lower rate than GSN (with an index number of ⁴³³ When index numbers for various women's demographics are calculated for all cable networks, the results show that GSN and WE tv are ranked very far apart in key demographics.⁴³⁴ For example, WE tv ranked out of 77 networks in audience concentration of women 25 to 54, while GSN ranked ⁴³⁵ In women 65 and older, GSN ranked and WE tv ranked ⁴³⁶ Advertisers regularly create and rely upon these types of indexes and rankings to help them determine where to buy advertising based on the target audience associated with their products.⁴³⁷ Advertisers looking to target women 25 to 54 would not consider GSN and WE tv at all similar based on these metrics.⁴³⁸

148. Finally, Mr. Blasius testified that advertisers consider a network's median age in purchasing advertising.⁴³⁹ GSN's higher median age makes it less appealing to advertisers seeking to target women 18 to 49 and women 25 to 54.⁴⁴⁰ The fact that of GSN's audience was outside the target demographic of 25-54 would be significant to advertisers seeking to target this demographic.⁴⁴¹

⁴³³ CV Exh. 764.

⁴³⁴ CV Exh. 764; Tr. 2414:6-20 (Blasius).

⁴³⁵ CV Exh. 764, Tr. 2414:14-20 (Blasius).

⁴³⁶ CV Exh. 764, Tr. 2414:21-24 (Blasius). As described above, the data collected by WE tv's advertising sales team in the ordinary course confirms Mr. Blasius's findings. WE tv's "Fact Sheets" show that WE tv regularly ranked among the fully-distributed cable networks in primetime audience concentration of women 18 to 49 and women 25 to 54, on the basis of VPVH. See CV Exh. 93.

⁴³⁷ Tr. 2414:25-2415:12, Tr. 2417:19-22 (Blasius).

⁴³⁸ Tr. 2415:7-12 (Blasius).

⁴³⁹ Tr. 2417:23-2418:1 (Blasius)

⁴⁴⁰ CV Exh. 228 ¶ 32 (Blasius).

⁴⁴¹ Tr. 2416:14-22 (Blasius), CV Exh. 228 ¶ 32 (Blasius).

149. In the face of these clear demographic differences between GSN and WE tv, GSN's expert, Dr. Singer, attempted to shift the focus by pointing to overlapping advertisers on the networks to show similarity.⁴⁴² But the majority of the overlapping advertisers on GSN and WE tv are major national advertisers that purchase advertising on virtually every cable network.⁴⁴³ Mr. Orszag has noted that the top 40 WE tv advertisers purchased advertising on approximately cable networks during the relevant period.⁴⁴⁴ Additionally, Mr. Orszag shows that there are only brands that are on both the WE tv and GSN top 40 list. These top 40 overlap brands are

—all national

advertisers that advertise widely.⁴⁴⁵ Mr. Blasius studied data on overlapping advertising spending by parent company and by brand, and came to the same conclusion: advertisers viewed GSN and WE tv as dramatically different.⁴⁴⁶ Any minimal overlap between advertisers on GSN and WE tv does not indicate that the networks are similar from an advertiser's perspective.

150. Although some advertisers purchased guarantees in the women 25 to 54 demographic from GSN, the majority of GSN's advertising sales were in fact unrelated to this demographic. Like other networks, GSN sells advertising during the annual upfront period in which it guarantees advertisers delivery of a specific number of "impressions"—viewers—in a particular demographic, such as women 25 to 54 or people (men and women) over the age of

⁴⁴² GSN Exh. 301 ¶¶ 52-55 (Singer).

⁴⁴³ CV Exh. 228 ¶¶ 58-65 (Blasius).

⁴⁴⁴ CV Exh. 334 ¶ 127 (Orszag).

⁴⁴⁵ *Id.* ¶ 130.

⁴⁴⁶ CV Exh. 228 ¶¶ 58-65 (Blasius).

50.⁴⁴⁷ After the upfront period, GSN also sells a certain amount of advertising with guaranteed demographics in the so-called “scatter” market.⁴⁴⁸ Finally, it sells “direct response” advertising, in which GSN does not make any demographic guarantee—one viewer is treated just like another, regardless of age or gender.⁴⁴⁹

151. In an effort to prove that GSN competes with WE tv for advertising sales in the women 25 to 54 demographic, Mr. Zaccario testified that [REDACTED] of GSN’s general rate advertising revenue—that is, upfront and scatter sales—between 2008 and 2012 came from sales that guaranteed delivery of women 25 to 54.⁴⁵⁰ Mr. Brooks cited similar data showing that, in 2010, women 25 to 54 guaranteed sales accounted for [REDACTED] of GSN’s “demographically-attributable sales revenue.”⁴⁵¹ But this testimony omits the fact that GSN’s revenue from upfront and scatter advertising sales is itself only a small portion of its total advertising revenue. For example, [REDACTED] of GSN’s advertising revenue in 2010 came from direct response advertising, which has no guaranteed demographic at all.⁴⁵² Further, even if [REDACTED] of the “guaranteed” upfront advertising sales were made in the women 25 to 54 demographic, these sales were only [REDACTED] of GSN’s total advertising revenue for the year.⁴⁵³ Even including scatter advertising, which is advertising sold in a guaranteed demographic outside of the upfront period, less than [REDACTED] of GSN’s overall advertising revenue in 2010 came from guaranteed

⁴⁴⁷ Tr. 728:22-729:4 (Zaccario); *see also* Joint Glossary at 5.

⁴⁴⁸ *See* Tr. 765:16-766:6 (Zaccario); Joint Glossary at 4.

⁴⁴⁹ *See* Tr. 769:12-770:7 (Zaccario); Joint Glossary at 2.

⁴⁵⁰ Tr. 728:5-14 (Zaccario); *see also* GSN Exh. 174 at 2.

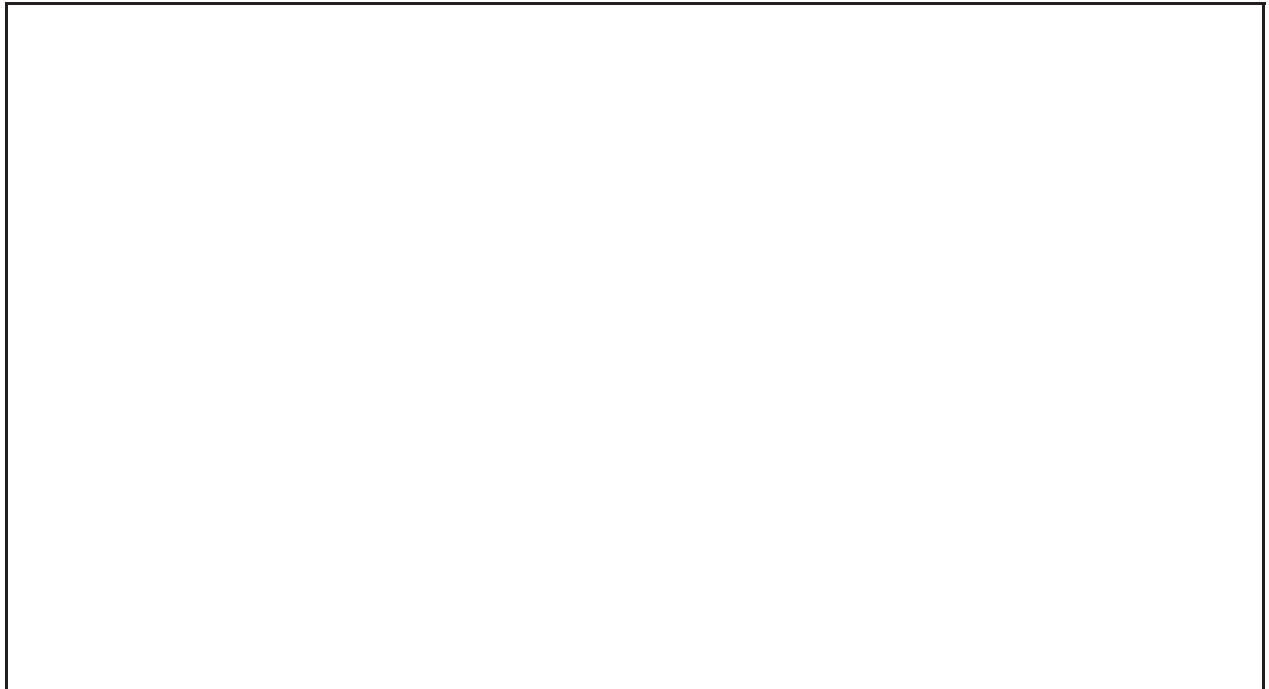
⁴⁵¹ GSN Exh. 300 ¶ 24 (Brooks).

⁴⁵² Tr. 768:3-769:15 (Zaccario).

⁴⁵³ Tr. 764:8-765:15 (Zaccario).

delivery of the women's 25 to 54 demographic.⁴⁵⁴ In sum, in 2010 roughly of GSN's advertising was not bought by advertisers in the women 25 to 54 demographic.

152. The advertising sales data introduced into evidence by GSN illustrates that sales in the women 25 to 54 demographic from 2008 to 2012 made up a minor portion of GSN's total advertising revenue:



153. Finally, that GSN did sell some targeted advertising in the women's 25 to 54 demographic is simply a function of the fact that the network's actual audience is not

⁴⁵⁴ Tr. 767:19-25 (Zaccario).

⁴⁵⁵ GSN Exh. 174 at 2.

⁴⁵⁶ To further put these figures in perspective, the data show that between 2008 and 2012 GSN earned almost as much advertising revenue from male-oriented poker and gaming enterprises as it did from advertisers seeking to target women 18 to 49. *See id.* at 30-31

attractive to advertisers. As Mr. Zaccario testified, a network cannot sell the 55 and older demographic to advertisers; by necessity, therefore, GSN sells into the 25 to 54 demographic even though a small fraction of its audience fits that profile.⁴⁵⁷

154. Third-party data from SNL Kagan on the “cost per mille” (CPM) differences between GSN and WE tv are also instructive. CPM is the measure of an advertisement’s cost-per-thousand viewers.⁴⁵⁸ Differences in price reflect a difference in value from the perspective of advertisers.⁴⁵⁹ Mr. Orszag reported the CPM for GSN and WE tv in 2010. The data showed that WE tv’s average CPM was , ranking it highest among cable networks in 2010.⁴⁶⁰ GSN’s CPM was much lower. GSN’s average CPM was , ranking it among cable networks in the same year.⁴⁶¹ On average, advertisers were willing to pay more than times as much to capture 1000 WE tv viewers as they were to capture 1000 GSN viewers. This shows that advertisers did not consider GSN and WE tv to be offering a product of similar value.⁴⁶²

⁴⁵⁷ Tr. 778:11-23 (Zaccario).

⁴⁵⁸ CV Exh. 228 ¶ 20 (Blasius); *see also* Joint Glossary at 2.

⁴⁵⁹ Tr. 994:19-20 (Singer).

⁴⁶⁰ CV Exh. 334 ¶ 116 (Orszag); CV Exh. 715 at 2.

⁴⁶¹ CV Exh. 334 ¶ 116 (Orszag); CV Exh. 715 at 4; *see also* CV Exh 153 at 2 (GSN internal email from Dec. 2010 highlighting that WE tv’s advertising rates in the New York DMA were about times GSN’s rates).

⁴⁶² GSN may suggest that the SNL Kagan data is unreliable as to GSN’s CPM and point, instead, to a 2010 document created after GSN’s upfront showing that GSN’s CPM was *See* GSN Exh. 65 at GSN_CVC_00056183; Tr. 1090:5-1091:23 (Singer). Yet GSN presented no evidence suggesting that it obtained the same CPM in the scatter or direct response advertising markets (substantial portions of GSN’s advertising sales) that it obtained during the upfront, or that SNL Kagan’s estimate was inaccurate for any other reason. In any event, GSN’s preferred CPM of is still of WE tv’s average CPM during the relevant period. Tr. 1108:15-1109:19 (Singer).

155. Finally, GSN and WE tv's placement in different advertising "clusters" on the major DBS operators, DIRECTV and DISH, further confirms that advertisers and MVPDs did not consider the networks to be similar. DISH and DIRECTV themselves sell advertising spots that are ceded by cable networks. Both DBS operators sell these spots across "clusters" of networks.⁴⁶³ An advertiser wishing to target a specific demographic, such as women, or children, can buy advertising in that cluster to reach a group of networks with similar audience profiles.⁴⁶⁴ Both DIRECTV and DISH offered "female" or "women" clusters that included WE tv but not GSN.⁴⁶⁵ The female clusters also included other women's networks such as Lifetime Movie Network, Oxygen, Style, OWN, and E!⁴⁶⁶ GSN was in the "adults" cluster on both DISH and DIRECTV, with networks like TNT, USA, and TVLand.⁴⁶⁷ Even DIRECTV, one of GSN's owners, did not sell GSN advertising in its women's cluster.

156. Ms. Hopkins, the former head of marketing for GSN, testified that she was aware of these clusters and knew that neither DBS operator placed GSN in its female cluster.⁴⁶⁸ She also testified that GSN used these clusters to purchase promotional time for its new shows.⁴⁶⁹ Ms. Hopkins never complained to anyone about GSN being placed in the adult cluster, including to DIRECTV, one of GSN's two owners.⁴⁷⁰ Throughout the relevant time period, and

⁴⁶³ CV Exh. 212 at 5 (DIRECTV clusters); CV Exh. 298 at 4 (DISH clusters).

⁴⁶⁴ CV Exh. 299 at 1, 3.

⁴⁶⁵ CV Exh. 212 at 5 (DIRECTV clusters); CV Exh. 298 at 4 (DISH clusters).

⁴⁶⁶ CV Exh. 298 at 4 (DISH clusters); CV Exh. 212 at 5; *see also* Tr. 655:22-656:21 (Hopkins) (discussing the DISH female cluster).

⁴⁶⁷ CV Exh. 299 at 3; CV Exh. 300; CV Exh. 212 at 5.

⁴⁶⁸ Tr. 648:21-649:25, Tr. 653:14-18 (Hopkins).

⁴⁶⁹ CV Exh. 405 at 3; *see also* Tr. 651:10-653:10 (Hopkins).

⁴⁷⁰ Tr. 650:18-651:1 (Hopkins). Ms. Hopkins testified that she thought some of the other clusters included female skewing networks as a way of getting advertisers to buy multiple clusters.

through today, an advertiser purchasing advertising time in the female clusters on DISH or DIRECTV would see their ads run on WE tv, but not on GSN.

D. GSN Has Never Been Part of WE tv's "Competitive Set"

157. GSN is not, and never has been, one of the networks that WE tv views as a primary competitor in its "competitive set," the group of networks that WE tv tracks and monitors in the regular course of business.⁴⁷¹ For the networks in WE tv's competitive set, WE tv takes "deep dives into looking at their programming, what their biggest hits were, where their core audience was, [and] how they were positioning themselves."⁴⁷²

158. WE tv does not consider every network that skews more female than male to be in its competitive set.⁴⁷³ Instead, WE tv focuses on whether the programming on a network is comparable, identifying some aspects that are similar and some it would like to emulate, and reviews extensive audience data about these networks, including whether they are attracting high numbers of women in the women 18 to 49 and women 25 to 54 demographics, their median ages, their female skew, and other data like their viewers' counties, education levels and income levels.⁴⁷⁴ During the 2009 to 2011 period, WE tv's competitive set consisted of

Tr. 653:19-654:8 (Hopkins). This, however, is pure conjecture. Ms. Hopkins has no direct evidence concerning how DISH and DIRECTV identify which networks should go in which clusters.

Tr. 657:1-15 (Hopkins).

⁴⁷¹ Tr. 1736:11-13, Tr. 1754:18-1755:7 (Dorée).

⁴⁷² Tr. 1736:9-17 (Dorée).

⁴⁷³ Tr. 1744:4-613(Dorée). More women than men watch television, so by definition most networks skew female, and there are many networks, probably about 150 or 200, that skew more female than male but that WE tv does not follow. Tr. 1744:6-10 (Dorée).

⁴⁷⁴ Tr. 1737:11-1739:11 (Dorée).

⁴⁷⁵ Once it was launched, in

—was also part of WE tv’s competitive set.⁴⁷⁶ WE tv understood that these networks all appealed to the same age and gender demographics that WE tv was trying to attract.⁴⁷⁷

159. WE tv regularly monitored the networks in its competitive set during the 2009 to 2011 period.⁴⁷⁸ WE tv compiled daily, weekly, monthly, quarterly and year-end reports that were sent on a regular basis to WE tv’s programming executives, including Ms. Dorée and other members of the network’s senior team.⁴⁷⁹ WE tv’s daily monitoring reports set forth how WE tv and WE tv’s competitive set had performed the prior day, specifically by tracking the Nielsen ratings of individual programs on these networks in the women 18 to 49 demographic.⁴⁸⁰ Similarly, WE tv’s weekly monitoring reports tracked the performance of WE tv and its competitive set on a weekly and quarter-to-date basis.⁴⁸¹ The reports contain charts and tables showing how WE tv and its competitors performed in the women 18 to 49 and women 25 to 54 demographics on average during the week in primetime, the median age of each of these

⁴⁷⁵ Tr. 1742:6-24 (Dorée).

⁴⁷⁶ CV Exh. 338 ¶¶ 24-25 (Dorée).

⁴⁷⁷ Tr. 1742:25-1743:2 (Dorée); CV Exh. 338 ¶¶ 24-25 (Dorée).

⁴⁷⁸ Tr. 1748:22-25 (Dorée).

⁴⁷⁹ Tr. 1749:6-9 (Dorée).

⁴⁸⁰ Tr. 1750:8-12 (Dorée); *see, e.g.*, CV Exh. 53 at 7; CV Exh. 55 at 8; CV Exh. 60 at 6; CV Exh. 62 at 5; CV Exh. 64 at 8; CV Exh. 68 at 6; CV Exh. 69 at 5; CV Exh. 71 at 5; CV Exh. 76 at 5; CV Exh. 78 at 6; CV Exh. 83 at 6; CV Exh. 88 at 4; CV Exh. 92 at 4; CV Exh. 97 at 6; CV Exh. 104 at 5; CV Exh. 107 at 5; CV Exh. 108 at 6; CV Exh. 113 at 4; CV Exh. 120 at 6; CV Exh. 123 at 5; CV Exh. 129 at 4; CV Exh. 135 at 6; CV Exh. 142 at 5; CV Exh. 158 at 4; CV Exh. 159 at 5; CV Exh. 164 at 5; CV Exh. 171 at 5; CV Exh. 174 at 6; CV Exh. 176 at 5; CV Exh. 183 at 5; CV Exh. 184 at 6; CV Exh. 185 at 4; CV Exh. 189 at 4; CV Exh. 191 at 4; CV Exh. 192 at 4; CV Exh. 196 at 5.

⁴⁸¹ Tr. 1754:15-1755:3 (Dorée).

networks, and a comparison of those metrics from the current week to prior periods.⁴⁸² These weekly reports also rank the shows aired by WE tv and its competitive set according to their delivery of women 18 to 49, and included data about their delivery in the women 25 to 54 demographic as well.⁴⁸³ GSN never appears on any of WE tv's daily or weekly monitoring reports.⁴⁸⁴

160. In addition to getting regular reports on its competitive set, WE tv sometimes prepared in-depth *ad hoc* reports about specific networks in its competitive set to provide a more comprehensive overview of how such networks attempted to attract women in the 18 to 49 and 25 to 54 demographics.⁴⁸⁵ WE tv never asked for or received an *ad hoc* report about GSN.⁴⁸⁶

161. During the relevant time period, WE tv's research department also prepared quarterly and year-end "WE tv Fact Sheets" for its ad sales group to use in selling advertising spots on WE tv.⁴⁸⁷ These fact sheets ranked the top twenty cable networks in terms of viewers per viewing household (VPVH)—target audience as a percentage of total viewing

⁴⁸² See, e.g., CV Exh. 58 at 6; CV Exh. 67 at 5; CV Exh. 75 at 8; CV Exh. 86 at 5; CV Exh. 103 at 5; CV Exh. 112 at 5; CV Exh. 128 at 15; CV Exh. 156 at 4; and CV Exh. 170 at 4.

⁴⁸³ See, e.g., CV Exh. 58 at 7; CV Exh. 67 at 6; CV Exh. 75 at 9; CV Exh. 86 at 6; CV Exh. 103 at 6; CV Exh. 112 at 6; CV Exh. 128 at 16; CV Exh. 156 at 5; and CV Exh. 170 at 5.

⁴⁸⁴ Tr. 1755:4-7, 1875:12-25, 1878:12-18 (Dorée).

⁴⁸⁵ Tr. 1755:16-23 (Dorée); CV Exh. 338 ¶ 28 (Dorée);
; see also CV Exh. 110 at 10, 13, 16 (audience segmentation study identifying which other networks WE tv's viewers were likely to watch and not including GSN); CV Exh. 149 at 4, 7

⁴⁸⁶ Tr. 1755:24-1756:2 (Dorée).

⁴⁸⁷ CV Exh. 338 ¶ 17 (Dorée)

households—in the women 18 to 49 and women 25 to 54 demographics.⁴⁸⁸ Unsurprisingly, many of the networks with the highest percentage of women 18 to 49 and women 25 to 54 in their audience—including

—make up WE tv’s competitive set.⁴⁸⁹ GSN never appears on this list.

162. WE tv’s internal and external branding and marketing documents also referred to WE tv’s competitive set during the 2009 to 2011 time period. For example, WE tv’s Brand Book listed

as the networks in WE tv’s competitive set.⁴⁹⁰ WE tv’s internal development overview document for 2009-2011 also contained a “Competitive Networks Comparison” and the other listed networks were⁴⁹¹ And WE tv’s March 2011 presentation to Time Warner Cable compared WE tv to⁴⁹² WE tv’s branding and marketing documents never referred to GSN as a competitor.

163. The overwhelming weight of the evidence shows that WE tv never sought to track or monitor GSN because WE tv did not consider GSN to be a competitive network.⁴⁹³ That is because WE tv perceived GSN as a much older skewing game show network rather than a women’s network.⁴⁹⁴

⁴⁸⁸ CV Exh. 93.

⁴⁸⁹ *Id.*

⁴⁹⁰ Tr. 1736:2-17 (Dorée); CV Exh. 227 at 21-22.

⁴⁹¹ CV Exh. 72 at 19.

⁴⁹² GSN Exh. 136 at 9.

⁴⁹³ Tr. 1756:2-4 (Dorée).

⁴⁹⁴ Tr. 1756:5-8 (Dorée).

164. Against the reams of documentary evidence showing that WE tv did not view GSN as a competitor, GSN focuses almost exclusively on a single document, the speaking notes of Ms. Martin (then WE tv's General Manager) for a Rainbow Media fall 2008 offsite presentation. One slide in that deck lists the networks with the largest year-to-year growth among women over the age of 2 among all cable networks—WE tv,

and GSN—and notes that WE tv enjoyed greater growth in women's viewing than any of its direct competitors.⁴⁹⁵ This document does not and cannot support the conclusion that WE tv viewed GSN as a part of its competitive set. First, the document does not identify each of the listed networks on the slide as a direct competitor. Second, Ms. Martin testified that GSN was not so perceived by her or by WE tv.⁴⁹⁶ A single slide in a single document, on this record, is not proof that WE tv viewed GSN as part of its competitive set.

165. Finally, although GSN did include WE tv in a number of its competitive analyses,⁴⁹⁷ this does nothing to advance GSN's claim that Cablevision discriminated against it. If Cablevision wanted to reposition GSN in order to benefit WE tv, it would need to take an adverse action against a network that WE tv viewed as a competitive threat.⁴⁹⁸ Moreover, Cablevision's launch of one of WE tv's actual competitors, , at the time of the

⁴⁹⁵ Tr. 68:1-7 (GSN's opening (citing GSN Exh. 13 at 4).)

⁴⁹⁶ Joint Exh. 6 at 126:4-7 (Martin) ("This was a slide that was put together to show all the networks that had big growth that year, this is not a slide of our direct competitors."), 129:16-18 (Martin) (testifying that "GSN has not been a competitor to WE in terms of the networks we track historically or currently"); *see also* Tr. 1872:25-1873:2, 1873:14-16 (Dorée) ("Q. . . . [I]s this slide and the fact that GSN appears on this slide -- does that represent the way, as far as you understand it, WE viewed its competitive set? A. No. . . . Q. Okay. So that was not, as far as you are concerned, representative of the way WE viewed its competitive set? A. That's correct.").

⁴⁹⁷ GSN's competitive set includes networks such as

See GSN Exh. 57 (GSN Email re: New Competitive Set).

⁴⁹⁸ CV Exh. 334 ¶ 25,139.

retiering, manifests that Cablevision made its carriage decisions in the normal course without regard for WE tv's views of the competition.⁴⁹⁹ GSN presented no evidence at trial suggesting any logical reason why Cablevision would "assist" WE tv by launching one of its direct competitors, while retiering GSN, a network that WE tv never viewed as competitive.

E. GSN and WE tv Do Not Compete for Viewers in Any Meaningful Way

166. Expert testimony confirms that WE tv does not, and Wedding Central did not, compete significantly with GSN for viewers. Cablevision's expert, Mr. Orszag, conducted three separate analyses to evaluate whether viewers perceived WE tv or Wedding Central as substitutes for GSN in the marketplace. The results of all three tests showed that they do not.⁵⁰⁰

167. Mr. Orszag demonstrated, through a direct test using Cablevision's STB data, that Cablevision subscribers who lost access to GSN after the retiering did not increase their viewership of WE tv or Wedding Central in any meaningful way.⁵⁰¹ In his empirical work, Mr. Orszag found that the retiering coincided with an increase of only 1.41 seconds of increased viewing time per household per day for WE tv.⁵⁰² Mr. Orszag found that the retiering coincided with an even lower increase in viewing time for Wedding Central, with an increase of only .86 seconds of view time per household per day.⁵⁰³ Mr. Orszag testified that these statistically and

⁴⁹⁹ CV Exh. 337 ¶ 61 (Montemagno) (discussing Cablevision's launch of OWN and Hallmark Movie Channel).

⁵⁰⁰ Tr. 2523:12-2524:3, 2525:13-2528:1 (Orszag); CV Exh. 334 ¶¶ 38-98 (Orszag).

⁵⁰¹ Tr. 2527:3-14 (Orszag); CV Exh. 334 ¶¶ 52-58.

⁵⁰² Tr. 2527:3-7, 2527:16-2528:1 (Orszag); CV Exh. 334 ¶ 54 (Orszag).

⁵⁰³ CV Exh. 334 ¶ 54 (Orszag).

economically insignificant⁵⁰⁴ increases demonstrate that viewers do not see WE tv and Wedding Central as substitutes for GSN; in the absence of GSN, viewers did not replace GSN with WE tv or Wedding Central.⁵⁰⁵

168. Mr. Orszag's conclusion that WE tv and Wedding Central did not experience a meaningful lift in viewership as a result of the retiering is corroborated by his study of WE tv's Nielsen ratings before and after the retiering. Those data show that WE tv's ratings fell in the New York DMA between April 2010 and April 2011 despite the fact that WE tv's national ratings went up during the same period.⁵⁰⁶ Such a decline in viewership in the New York DMA, especially in the face of a lift in WE tv viewership nationally, is inconsistent with GSN's allegation that WE tv received an artificial lift in viewership as a result of the GSN retiering.⁵⁰⁷

169. Mr. Orszag performed a second analysis of the switching behavior of WE tv and GSN viewers that also demonstrated that viewers do not see WE tv and Wedding Central as substitutes for GSN.⁵⁰⁸ This analysis measures viewer choice between networks by using STB data to assess what channels television viewers switched to when they were watching GSN and WE tv.⁵⁰⁹ Mr. Orszag found that when viewers changed from WE tv to other channels, they switched to 32 other networks more often than they switched to GSN.⁵¹⁰ And when viewers

⁵⁰⁴ *Id.*

⁵⁰⁵ Tr. 2526:6-17 (Orszag); CV Exh. 334 ¶¶ 57-58 (Orszag).

⁵⁰⁶ Tr. 2528:2-18 (Orszag); CV Exh. 334 ¶ 58 (Orszag).

⁵⁰⁷ CV Exh. 334 ¶ 58 (Orszag).

⁵⁰⁸ *Id.* ¶¶ 59-74.

⁵⁰⁹ *Id.* ¶¶ 58-59.

⁵¹⁰ *Id.* ¶¶ 61-63; Tr. 2534:1-10 (Orszag).

changed channels from Wedding Central to other channels, they switched to 48 other networks more often than they switched to GSN.⁵¹¹ Particularly when compared to the switching rates of benchmark, similar networks such as ESPN and ESPN2, Mr. Orszag determined that the switching rates between WE tv and GSN, and Wedding Central and GSN, show that those networks do not compete significantly for viewers' time and thus are not perceived by viewers to be similar.⁵¹²

170. Mr. Orszag also showed that network channel placement did not have a significant impact on the conclusions he drew from his switching analysis. For example, Mr. Orszag testified that the switching analysis he performed for GSN showed that viewers very frequently switched away from GSN to networks that were not in its immediate "neighborhood" of channels, and were in fact often quite far away, indicating that the likelihood of switching from one channel to another is not dictated solely by the channels' placement near one another.⁵¹³

171. Mr. Orszag performed a third set of analyses, concerning viewer overlap, that corroborated his results.⁵¹⁴ Using Cablevision's STB data, which Mr. Orszag explained is a richer data set for these purposes than the one used by Nielsen,⁵¹⁵ he concluded that GSN accounts for only 0.60% of total viewership among households that watched WE tv for at least

⁵¹¹ CV Exh. 334 ¶ 64 (Orszag).

⁵¹² *Id.* ¶¶ 70-72. For example the switching rate from WE tv to GSN was only 0.55% in April 2010, but the ESPN2 to ESPN switching rate was 16.2%. *Id.* ¶ 73.

⁵¹³ Tr. 2535:7-2537:11 (Orszag).

⁵¹⁴ Tr. 2537:22-2541:13 (Orszag); CV Exh. 334 ¶¶ 75-87 (Orszag).

⁵¹⁵ Tr. 2524:4-2525:12 (Orszag).

one hour in April 2010.⁵¹⁶ For Wedding Central, it was 0.39%.⁵¹⁷ These levels are very low, particularly when compared to sets of indisputably similar benchmark networks. For example, in April 2010, VH1 viewers accounted for 75.7% of MTV viewership.⁵¹⁸ Mr. Orszag also studied viewer overlap using Nielsen data showing the percentage of WE tv viewers who watched 96 other broadly-distributed cable networks. He found that WE tv viewers in both the persons 18 and older and women 25 to 54 demographics watched other networks at a higher rate than they watched GSN.⁵¹⁹

172. In contrast to the three tests and multiple confirmatory analyses that Mr. Orszag did to evaluate whether GSN and WE tv competed for viewers, GSN's expert, Dr. Singer, offered just two opinions suggesting that the networks competed: one based on a Nielsen "both duplication" measure of viewer overlap, and another based on flawed adjustments to Mr. Orszag's direct test.

173. The evidence showed that the "both duplication" analysis relied upon by Dr. Singer is not used by GSN in the ordinary course of business and leads to aberrational results. By way of background, Nielsen provides three different sets of duplication data: primary duplication, secondary duplication and both duplication, each of which can be assessed from the perspective of one network or the other. The primary duplication measure shows the percentage of the audience of a given network—the primary network—that watches another

⁵¹⁶ CV Exh. 334 ¶ 82 (Orszag).

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* ¶ 86.

⁵¹⁹ *Id.* ¶¶ 78-80; *see also* Tr. 2540:23-2541:1 (Orszag). For example,

(Table 9) (Orszag).

CV Exh. 334 ¶ 78

network—the secondary network.⁵²⁰ This is calculated by dividing the number of overlapping viewers of two networks by the total number of viewers of the primary network.⁵²¹ As an example of primary duplication, Mr. Orszag testified that [REDACTED] of WE tv’s total audience of adults 18 and older also watched GSN during the fourth quarter of 2010.⁵²² The secondary duplication measure shows the percentage of the secondary network’s total audience that also watches the primary network, and is calculated by dividing the number of overlapping viewers of the two networks by the total number of viewers of the secondary network.⁵²³ An example of secondary duplication is described in Dr. Singer’s written testimony, where he notes that [REDACTED] of Centric’s total adult viewers also viewed GSN.⁵²⁴ Finally, the both duplication measure shows the percentage of the two networks’ total audiences that is watched by overlapping viewers; it is calculated by dividing the number of overlapping viewers by the combined number of viewers of both networks.⁵²⁵ Depending on which network’s “perspective” is used in the analysis, the duplication rank of another particular network will vary.⁵²⁶

174. For his duplication analysis, Dr. Singer only reviewed the “both duplication” measure from GSN’s perspective, which is only one of six possible duplication

⁵²⁰ CV Exh. 334 ¶ 77 (Orszag).

⁵²¹ *Id.* ¶ 195.

⁵²² *Id.* ¶ 78 (Table 8).

⁵²³ *Id.* ¶ 195.

⁵²⁴ GSN Exh. 301 ¶ 34 (Singer).

⁵²⁵ CV Exh. 334 ¶ 195 (Orszag).

⁵²⁶ For example, Mr. Orszag testified that “GSN’s primary duplication rank from the perspective of WE tv (i.e., the percentage of WE tv viewers who also watched GSN . . .)” was [REDACTED] for persons 18 and older, while “WE tv’s primary duplication rank from the perspective of GSN (i.e., the percentage of GSN viewers who also watched WE tv . . .)” was [REDACTED] for persons 18 and older. *Id.* ¶ 93.

analyses that can be performed.⁵²⁷ As Mr. Orszag testified, however, a review of the other five duplication analyses demonstrates that there is no significant overlap between WE tv and GSN in terms of audience.⁵²⁸ In fact, the both duplication analysis from GSN's perspective is the only duplication analysis in which WE tv and GSN are shown to have overlapping audiences in any meaningful way.⁵²⁹

175. Moreover, in the ordinary course of business, GSN appears to analyze primary and secondary duplication measures, not both duplication, to determine its audience overlap with other networks.⁵³⁰ For example, an internal GSN email from March 2009 contains an analysis of GSN's audience overlap with

⁵³¹ Likewise, in a May

2010 email attaching a duplication report, Dana Shaddow, of GSN's Ad Sales Research team, instructed the recipients of the report to

⁵²⁷ Tr. 936:12-937:16 (Singer). The others are primary duplication from GSN's perspective, secondary duplication from GSN's perspective, primary duplication from WE tv's perspective, secondary duplication from WE tv's perspective, and both duplication from WE tv's perspective. *See* CV Exh. 334 ¶ 93 (Orszag).

⁵²⁸ Tr. 2540:3-20 (Orszag); CV Exh. 334 ¶¶ 92-93 (Orszag).

⁵²⁹ Tr. 2541:2-25 (Orszag); CV Exh. 334 ¶¶ 92-93 (Orszag); Tr. 950:6-951:19 (Singer). Although WE tv ranked [REDACTED] in both duplication for persons 18 and older from GSN's perspective, it ranked [REDACTED] and [REDACTED] in primary and secondary duplication from GSN's perspective for persons 18 and older. CV Exh. 334 ¶ 93 (Orszag). From WE tv's perspective, GSN ranked [REDACTED] in both duplication for persons 18 and older and [REDACTED] in primary and secondary duplication for persons 18 and older. *Id.* These results are consistent with duplication rates between WE tv and GSN in the other demographic groups Mr. Orszag examined. *Id.*

⁵³⁰ Tr. 943:8-949:12 (Singer).

⁵³¹ CV Exh. 701.

„⁵³² GSN

adduced no document demonstrating that GSN analyzed both duplication analyses in the ordinary course of its business. Nor did it come forward with any testimony, expert or fact.

176. As for Dr. Singer’s adjustments to Mr. Orszag’s direct test analysis, the evidence showed that even if Dr. Singer’s changes are accepted (changes that Mr. Orszag has testified are inappropriate), the result is still only a mere 2% lift in WE tv viewership from the GSN retiering.⁵³³ And although Dr. Singer opined that Dr. Orszag’s analysis excluded “loyal” GSN viewers who would, in his opinion, transfer more of their viewing time to WE tv if they lost access to GSN, he failed to explain at trial why that analysis is relevant in the real world.⁵³⁴ Dr. Singer testified that he believed the viewership lift WE tv received as a result of the retiering to be “economically significant,”⁵³⁵ but he conceded that he had made no attempt to calculate how much additional revenue WE tv earned from this increased viewership of a few seconds a day.⁵³⁶ In fact, the evidence at trial showed that a small viewership increase for WE tv in the Cablevision footprint, which represented approximately of WE tv’s total subscribers, would have such an infinitesimal impact on WE tv’s national ratings that it would never register with Nielsen or with WE tv’s national advertisers.⁵³⁷

⁵³² CV Exh. 702.

⁵³³ Tr. 961:3-5 (Singer).

⁵³⁴ Tr. 963:12-964:12 (Singer).

⁵³⁵ Tr. 971:3-7 (Singer).

⁵³⁶ See Tr. 970:5-971:7, 975:4-19, 982:11-14 (Singer).

⁵³⁷ Tr. 2527:10-2528:1 (Orszag); *see also* Tr. 978:22-979:4 (Singer).

VI. GSN HAS NOT PROVEN THAT AN INFERENCE OF DISCRIMINATORY INTENT MAY BE DRAWN FROM EVIDENCE THAT CABLEVISION TREATED WE TV AND WEDDING CENTRAL DIFFERENTLY THAN GSN

177. GSN contends that Cablevision's discriminatory intent in retiering GSN could be inferred from Cablevision's allegedly favorable treatment of its affiliated networks. But GSN cannot manufacture a discrimination claim simply from allegations that Cablevision unfairly favored its affiliates. As set out in the Proposed Conclusions of Law, below, this evidence is irrelevant where, as here, the respective networks are not similarly situated.

178. Moreover, GSN's accusations of favoritism have nothing to do with GSN's allegation that Cablevision chose to retier GSN in order to confer an unfair advantage on WE tv. The evidence shows that neither WE tv nor Cablevision would have perceived any benefit to WE tv from disadvantaging GSN. WE tv's routine and frequent analysis of its competitive set confirm that WE tv did not see GSN as a competitive threat.⁵³⁸ Retiering GSN did not advantage Cablevision's affiliated networks. Moreover, Cablevision's launch of WE tv's competitor, at the time of the retiering, makes plain that Cablevision made its carriage decisions in the normal course without regard for WE tv's views of the competition.⁵³⁹

179. Nevertheless, GSN argues (i) that Cablevision did not have arms-length carriage negotiations with its affiliated networks; (ii) that Cablevision gave its affiliated networks above-market carriage; (iii) that Cablevision entered into carriage agreements with its affiliated networks, while leaving GSN out of contract; (iv) that Cablevision did not enforce a

⁵³⁸ See supra ¶¶ 157-163.

⁵³⁹ CV Exh. 337 ¶ 61 (Montemagno) (discussing Cablevision's launch of

(v) that Cablevision gave favorable channel placement to its affiliated networks; (vi) that Cablevision gave marketing and promotional support to Wedding Central that it did not give to GSN; and (vii) that Cablevision protected its affiliated networks from retiering.⁵⁴⁰ These allegations of Cablevision's favoritism are misleading or untrue.

180. To begin, the evidence shows that Cablevision engaged in arms-length negotiations with its affiliated networks regarding carriage. Mr. Broussard testified that his carriage negotiations with Cablevision were "arms' length, hard core negotiations."⁵⁴¹ Mr. Montemagno confirmed that Cablevision conducted "arms-length negotiations" with WE tv and Wedding Central,⁵⁴² and that the negotiations were "hard."⁵⁴³ Mr. Montemagno further testified that although he could not simply walk away from negotiating with Cablevision's affiliated networks in the same way that he could with unaffiliated networks, this did not change the fact that the rates and terms of Cablevision's agreements with its affiliates were negotiated at arms-length.⁵⁴⁴

181. Indeed, Mr. Broussard testified that WE tv did not receive better terms of carriage because of the relationship with Cablevision.⁵⁴⁵ Cablevision
and WE tv's level of penetration on
Cablevision

⁵⁴⁰ Tr. 71:14-72:6 (GSN Opening Argument).

⁵⁴¹ Tr. 1931:8-9 (Broussard); *see also* CV Exh. 339 ¶ 10 (Broussard).

⁵⁴² CV Exh. 337 § VI.A (Montemagno).

⁵⁴³ Tr. 1548:18 (Montemagno).

⁵⁴⁴ *See* Tr. 1548:20-1548:23, 1549:7-9 (Montemagno).

⁵⁴⁵ Tr. 1931:10-14 (Broussard).

⁵⁴⁶ As for Wedding Central, Mr. Broussard explained that Cablevision was not the only MVPD to carry Wedding Central on its digital basic tier. Mediacom also carried Wedding Central on its digital basic tier (although this tier was, because of the way Mediacom marketed its products, penetrated at only a level).⁵⁴⁷ And Wedding Central's penetration on Time Warner Cable's system in Manhattan was roughly , which was approximately the same level as Wedding Central's penetration on Cablevision.⁵⁴⁸ Like these other distributors, Cablevision launched Wedding Central

⁵⁴⁹ Cablevision launched Wedding Central

182. Contrary to GSN's assertions, Cablevision does not provide its other affiliated networks with preferential carriage treatment. Both Sundance and IFC, two of Cablevision's affiliated networks, are not carried by Cablevision on the Expanded Basic tier despite Mr. Broussard's best efforts.⁵⁵²

183.

⁵⁴⁶ See Tr. 1932:12-1933:8 (Broussard); *see also* CV Exh. 339 ¶¶ 11-13 (Broussard).

⁵⁴⁷ See Tr. 2024:20-2025:3 (Broussard).

⁵⁴⁸ Tr. 2099:5-13 (Broussard).

⁵⁴⁹ CV Exh. 339 ¶ 20 (Broussard).

⁵⁵⁰ Tr. 1945:19-1946:6 (Broussard); *see also* CV Exh. 339 ¶ 22 (Broussard) .

⁵⁵¹ CV Exh. 337 ¶ 88 (Montemagno).

⁵⁵² Tr. 1929:12-15, 1930:21-23 (Broussard).

184. Nor is Cablevision's allegedly favorable channel placement for its affiliated networks evidence of discriminatory intent. For example, Cablevision carries Sundance, which is also a network affiliated with Cablevision, on channel 192.⁵⁵⁵ Mr. Broussard does not view that placement as favorable, and has been unsuccessful in efforts to persuade Cablevision to move Sundance to a lower place on the dial, despite Sundance's affiliation with Cablevision.⁵⁵⁶ When Wedding Central launched, Cablevision placed it at channel 177.⁵⁵⁷ By contrast, Cablevision carries GSN on channel 88, a far better channel position.⁵⁵⁸ Although GSN has complained about its channel placement in this litigation, GSN presented no evidence that it raised these complaints with Mr. Montemagno when negotiating carriage. Moreover, as

⁵⁵³ Tr. 1941:2-1942:3 (Broussard); *see also* CV Exh. 339 ¶ 17 (Broussard); Tr. 1651:9-1652:3 (Montemagno); CV Exh. 660.

⁵⁵⁴ Tr. 1943:9-14 (Broussard); *see also* CV Exh. 339 ¶ 18 (Broussard) .

⁵⁵⁵ Tr. 2119:16-18 (Broussard) .

⁵⁵⁶ Tr. 2120:1-9 (Broussard).

⁵⁵⁷ CV Exh. 337 ¶ 82 (Montemagno).

⁵⁵⁸ Tr. 2121:1-2 (Broussard).

Mr. Montemagno testified, he did not view GSN as belonging in the neighborhood of women's networks surrounding WE tv.⁵⁵⁹

185. Finally, the record also reflects that Cablevision's provision of marketing support to Wedding Central, and alleged withholding of that same support from GSN, was not discriminatory. Both Mr. Broussard and Mr. Montemagno testified that it is common for MVPDs to provide promotional support for networks when they launch.⁵⁶⁰ Cablevision's promotional support to Wedding Central (a new network) was not unusual,⁵⁶¹

Moreover, Mr. Montemagno offered uncontradicted testimony describing the promotional support Cablevision gave to GSN as well when GSN was first launched in [REDACTED] and when it expanded its carriage on Cablevision in [REDACTED].⁵⁶³

This is not evidence of discrimination.

⁵⁵⁹ CV Exh. 337 ¶¶ 82-83 (Montemagno).

⁵⁶⁰ Tr. 2101:25-2102:2 (Broussard); CV Exh. 337 ¶ 75 (Montemagno).

⁵⁶¹ Tr. 2102:3-4 (Broussard).

⁵⁶² Tr. 2102:5-11 (Broussard).

⁵⁶³ CV Exh. 337 ¶¶ 76-77 (Montemagno).

⁵⁶⁴ *Id.* ¶ 76.

VII. GSN HAS NOT PROVEN THAT AN INFERENCE OF DISCRIMINATION CAN BE DRAWN FROM A COST-BENEFIT ANALYSIS OF CABLEVISION'S RETIERING DECISION

186. GSN also contends that an inference of discriminatory intent can be drawn from a cost-benefit analysis that, in the view of GSN's expert, Dr. Singer, indicates that Cablevision's retiering decision was unprofitable. Any cost-benefit analysis is relevant only if GSN can prove that it is similarly situated to WE tv, which it cannot. In any case, the record shows that Dr. Singer's analysis cannot be credited because it is predicated on unsupported assumptions and flawed economics. As Mr. Orszag demonstrated, although Cablevision's decision must properly be assessed on an *ex ante* basis, even an *ex post* analysis of the profitability of Cablevision's retiering decision confirms that it was a rational exercise of good-faith business judgment.⁵⁶⁵

A. GSN Has Not Proven that Application of a Cost-Benefit Test to Cablevision's Retiering Decision Shows that the Decision Was Unprofitable

187. For all the reasons set out above, when assessed on an *ex ante* basis, Cablevision's decision to retier GSN was grounded in rational business judgment.⁵⁶⁶ To be sure, as Mr. Orszag explained, at the time of the retiering Cablevision could not have known many of the facts surrounding the eventual customer churn and customer purchases of the sports tier, or whether its decision would be a mistake.⁵⁶⁷ But Mr. Orszag also opines that *ex post* evidence

⁵⁶⁵ *Ex ante* means "Based on assumption and prediction, on how things appeared beforehand, rather than in hindsight; subjective; prospective." *Black's Law Dictionary* (10th ed. 2014). *Ex post* means "Based on knowledge and fact; viewed after the fact, in hindsight; objective; retrospective." *Id.*

⁵⁶⁶ See *supra* ¶¶ 35-52; CV Exh. 334 ¶¶ 141-143 (Orszag).

⁵⁶⁷ CV Exh. 334 ¶ 240 (Orszag). Dr. Singer agrees. He submitted sworn testimony in 2013 in which he stated that an *ex post* analysis "cannot validate Cablevision's decisions as these precise outcomes could not have been known *ex ante* to Cablevision." Tr. 1018:8-1020:3 (Singer).

that the decision was a profitable one can confirm that the decision was rational and made in good faith.⁵⁶⁸ The record evidence demonstrates that this is precisely what happened here.

188. Cablevision's decision to retier GSN was designed to be a profitable one. It is undisputed that Cablevision saved approximately per year (or about per month) in carriage fees as a result of the retiering.⁵⁶⁹ This real-world cost-savings does not require any expert testimony or after-the-fact analysis to prove; it was indisputable that retiering GSN would result in this savings.⁵⁷⁰

189. Mr. Orszag testified that Cablevision accrued an additional benefit from the retiering by attracting new subscribers to its Sports & Entertainment tier. Mr. Orszag's analysis showed that of the approximately subscribers who signed up for the Sports & Entertainment tier between April 2010 and April 2011, added the tier as a result of GSN being placed on it.⁵⁷¹ Cablevision's records show that there was an unusually sharp increase in the number of S&E tier subscribers in the months following the retiering,⁵⁷² corroborating Mr. Orszag's conclusion. Because subscribers paid an additional fee of \$6.95 per month to receive the Sports & Entertainment tier, Cablevision earned in annual additional profits as a result of the retiering.⁵⁷³

⁵⁶⁸ CV Exh. 334 ¶¶ 144-150 (Orszag).

⁵⁶⁹ CV Exh. 334 ¶ 141 (Orszag); Tr. 890:5-8 (Singer).

⁵⁷⁰ See, e.g., CV Exh. 119 at 3-4.

⁵⁷¹ Tr. 2568:8-10 (Orszag); CV Exh. 334 ¶ 150 (Orszag).

⁵⁷² GSN Exh. 156 (showing that the number of Sports & Entertainment tier subscribers increased by over during the entire year 2010).

⁵⁷³ CV Exh. 334 ¶ 214 (Orszag).

190. Against these benefits, Mr. Orszag assessed the costs that Cablevision incurred from the retiering. Mr. Orszag examined whether customers canceled their Cablevision subscriptions—“churned”—as a result of GSN being moved from the Expanded Basic tier to the Sports & Entertainment Tier. Mr. Orszag found that there was no statistically significant churn as a result of the retiering.⁵⁷⁴ In layman’s terms, Mr. Orszag demonstrated that an economist cannot state, at a level of confidence acceptable in that field, that *any subscriber* left Cablevision as a result of the retiering.⁵⁷⁵ In sum, because Cablevision saved _____ of dollars a year in license fees, earned _____ of dollars more per year from new Sports & Entertainment tier subscribers, and saw no increase in customer churn, Cablevision’s decision to retier GSN proved to be a profitable one.

191. Like Mr. Orszag, Dr. Singer offered an opinion on the costs and benefits to Cablevision of the retiering. Although he initially disputed that Cablevision obtained any cost savings from the retiering, in his trial testimony Dr. Singer did not (indeed, cannot) dispute that Cablevision saved _____ per month in carriage fees by retiering GSN.⁵⁷⁶ Instead, in order to support his conclusion that the retiering decision was ultimately unprofitable, Dr. Singer

⁵⁷⁴ Tr. 2559:18-20 (Orszag); CV Exh. 334 ¶ 147 (Orszag); CV Exh. 335 at 67-68 (Orszag Appendix F).

⁵⁷⁵ CV Exh. 335 at 68 ¶ 4 (Orszag Appendix F); CV Exh. 334 ¶ 147 (Orszag). Mr. Orszag explained that statistical significance is normally assessed at the 99% confidence level (strong significance), the 95% level (statistical significance), and 90% level (weak significance). Tr. 2562:10-2563:1 (Orszag). According to Mr. Orszag’s analysis, the churn caused by the GSN retiering cannot be estimated at one of the accepted confidence levels; this means that, as an economist, Mr. Orszag could not state with any confidence that the retiering caused any Cablevision customers to churn. Tr. 2559:4-2560:11 (Orszag). Likewise, Dr. Singer’s churn analysis does not render a result that is significant at one of the accepted confidence levels—his model finds 89% significance—and therefore an economist would not find his estimate of churning customers reliable either. Tr. 2562:10-2563:4 (Orszag).

⁵⁷⁶ Tr. 890:5-8 (Singer).

focused on costs that Cablevision may have incurred from the retiering. However, Dr. Singer's analyses proved to be unreliable.

192. First, Dr. Singer estimates the costs Cablevision incurred as a result of subscribers who actually left or would have left Cablevision because of the retiering. He begins by assigning a monetary value to each subscriber, a number that has shifted over time to "make the numbers work." On cross-examination, Dr. Singer acknowledged that in his original written direct testimony, filed in March 2013, he estimated Cablevision's marginal lost profit for each churning subscriber to be _____ per month.⁵⁷⁷ He repeated this estimate yet again in his written direct testimony filed in advance of the hearing,⁵⁷⁸ but at the hearing itself he suggested that a higher amount of _____ per month was, in fact, the "best estimate" of Cablevision's marginal losses for each subscriber it loses to churn.⁵⁷⁹ Dr. Singer admitted that the per month figure was one he could have calculated in 2013,⁵⁸⁰ and gave no credible testimony as to why he changed his mind in the intervening two years between his sworn statements.⁵⁸¹

193. Whatever the lost profit margin, Dr. Singer cannot show a loss to Cablevision because his estimate of the number of subscribers who left (or would have left) as a result of the retiering is based on statistically unsound analysis and unreliable assumptions. Initially, Dr. Singer testified that Cablevision lost between _____ subscribers as a result of the retiering.⁵⁸² Mr. Orszag's testimony demonstrated that Dr. Singer's churn number is

⁵⁷⁷ Tr. 1023:16-18 (Singer); *see also* GSN Exh. 301 ¶ 82, ¶ 82 n. 156 (Singer).

⁵⁷⁸ GSN Exh. 301 ¶ 82 (Singer).

⁵⁷⁹ Tr. 1023:19-22 (Singer).

⁵⁸⁰ Tr. 1023:23-25 (Singer).

⁵⁸¹ Tr. 1023:23-1026:18 (Singer).

⁵⁸² Tr. 900:14-22, 1031:20-25 (Singer); GSN Exh. 301 ¶ 82 (Singer).

not reliable within the 1%, 5%, or 10% confidence intervals commonly accepted in the field of economics.⁵⁸³ Statistical significance is a measure of an economist's confidence in the reliability of an estimate.⁵⁸⁴ Dr. Singer did not even attempt to rebut Mr. Orszag's criticism; and "take[s] no opinion" as to whether this churn figure is statistically different from zero.⁵⁸⁵ As a result, there is no sound economic basis for finding that between [REDACTED] customers canceled their Cablevision subscriptions as a result of the GSN retiering.

194. At trial, Dr. Singer further inflated his estimate of churning Cablevision customers by adding an additional [REDACTED] subscribers who did not actually leave Cablevision, but who, according to Dr. Singer, would have left in the absence of a

Testimony at trial revealed this assumption to be wholly indefensible and unreliable. Dr. Singer applied no economic or other specialized analysis to come to his conclusion that all subscribers who received the subsidy would have churned in its absence. Instead, Dr. Singer's testimony makes it clear that his assumption is based on no more than guesswork: he testified that Cablevision "was apparently trying to infer the likelihood of defection" and that if Cablevision "thought the threat was sufficiently high" it would offer a subsidy to the complaining subscriber.⁵⁸⁷ He cited no record evidence in his written direct testimony for these

⁵⁸³ Tr. 2562:10-2563:4 (Orszag).

⁵⁸⁴ Tr. 2559:21-2560:11 (Orszag).

⁵⁸⁵ GSN Exh. 301 ¶ 82 n. 156 (Singer).

⁵⁸⁶ Tr. 910:1-12 (Singer); GSN Exh. 301 ¶ 82 (Singer).

⁵⁸⁷ GSN Exh. 301 ¶ 82 n. 153 (Singer).

statements,⁵⁸⁸ testifying that his understanding of the Cablevision subsidy “was based on conversations with counsel.”⁵⁸⁹

195. Dr. Singer’s assumption is not only speculative, it is also contradicted by the record evidence and common sense. The evidence at trial showed that approximately

subscribers called to complain about the retiering.⁵⁹⁰ It is undisputed that approximately of those subscribers called before February 4, 2011, the date on which Cablevision began offering any new complaining subscribers the

⁵⁹¹ As Dr. Singer conceded, Cablevision did not offer the subsidy to any of the subscribers who called before the subsidy program was initiated on February 4, 2011.⁵⁹² Of the subscribers who called after February 4, 2011,

⁵⁹³ Thus, although Dr. Singer refused to acknowledge it in his trial testimony, the obvious difference between those subscribers who received the subsidy and those who did not was not a matter of them being “really, really upset” or their “sincerity.”⁵⁹⁴ It was instead a simple matter of timing: did the subscriber call to complain before February 4, 2011, or did he call after? Dr. Singer’s assumption that the subscribers who received the subsidy were the ones most likely to cancel their subscriptions is not grounded in any record evidence.

⁵⁸⁸ *Id.*

⁵⁸⁹ Tr. 1052:19-1053:22 (Singer).

⁵⁹⁰ GSN Exh. 301 ¶ 82 n. 153 (Singer); *see also* Tr. 93:7-13 (GSN Opening); GSN Exh. 132 at CV-GSN 0427794.

⁵⁹¹ GSN Exh. 124; Tr. 1108:4-6 (Singer).

⁵⁹² GSN Exh. 124; Tr. 1052:8-13 (Singer).

⁵⁹³ GSN Exh. 182; CV Exh. 334 ¶ 214 (Orszag); GSN Exh. 301 ¶ 81 (Singer).

⁵⁹⁴ Tr. 910:24-911:1, 1048:20-1049:4 (Singer).

196. The invalidity of Dr. Singer’s analysis is further demonstrated by using his own “churn” numbers. According to Dr. Singer, of the subscribers who called prior to the authorization of _____ and therefore were not subsidized, at most _____—actually churned away from Cablevision.⁵⁹⁵ Dr. Singer was unable to explain at trial his basis for believing that 100% of the subscribers who called *after* February 4, 2011 would have churned, when his testimony shows that, at most, _____ of those who called *prior* to February 4, 2011 (when no subsidy existed) would have churned.⁵⁹⁶

197. Second, Dr. Singer inflates his Cablevision cost estimates by ascribing to Cablevision a “loss of goodwill” cost of _____ per month owing to subscribers who complained but neither left Cablevision nor received a subsidy.⁵⁹⁷ This opinion, too, is founded on unreliable assumptions and faulty analysis. Dr. Singer admitted at trial that his methodology for calculating goodwill here is not based on any generally accepted method that economists ordinarily use.⁵⁹⁸ Specifically, Dr. Singer testified that his only reason for ascribing a _____ per month goodwill loss to each complaining subscriber was that it was the “best data that’s in the record.”⁵⁹⁹ His goodwill analysis is not based on any recognized methodology that either he

⁵⁹⁵ GSN Exh. 301 ¶ 81 (Singer) (estimating that between _____ subscribers churned due to the retiering). Cablevision disputes Dr. Singer’s estimate of churn because it is statistically no different than zero. However, for the purpose of illustration, even using Dr. Singer’s upper-bound estimate of _____ subscribers who churned as a result of the retiering, the result is that only _____ unsubsidized callers churned because of the retiering

⁵⁹⁶ Tr. 1048:15-1053:22 (Singer).

⁵⁹⁷ Tr. 903:9-905:12 (Singer); GSN Exh. 301 ¶ 83 (Singer).

⁵⁹⁸ Tr. 1056:12-17 (Singer).

⁵⁹⁹ Tr. 1055:21-1056:5 (Singer).

or any other economist has applied.⁶⁰⁰ Although Dr. Singer offered direct testimony that he has opined about loss of goodwill in a previous case,⁶⁰¹ cross-examination revealed that Dr. Singer did not do “any empirical work” in that action.⁶⁰² To the contrary, in that case Dr. Singer testified that a loss in goodwill “defies monetary compensation” and could not be cured with “monetary damages,”⁶⁰³ which is an opinion diametrically opposed to the quantification of lost goodwill he gives here.

198. Finally, as an alternative, Dr. Singer testified that the decision to retier GSN was unprofitable for Cablevision because it would have been more profitable to retier WE tv or Wedding Central.⁶⁰⁴ This analysis is flawed in several respects. Initially, Dr. Singer testified that his analysis of the effects of a hypothetical WE tv retiering was based on the same model he used to calculate the effects of the GSN retiering.⁶⁰⁵ He readily agreed that if the model he used to predict churn from the GSN retiering lead to faulty results, using the same model to predict the results of a hypothetical WE tv retiering would also lead to faulty results.⁶⁰⁶ Because Dr. Singer’s model of GSN churn is demonstrably unreliable, due to its inability to predict results at acceptable degrees of statistical significance,⁶⁰⁷ no credence should be placed in his analysis of potential churn from a WE tv retiering.

⁶⁰⁰ Tr. 1056:16-17 (Singer).

⁶⁰¹ Tr. 905:24-906:5 (Singer).

⁶⁰² Tr. 1003:16-17 (Singer).

⁶⁰³ Tr. 1002:23-1003:12 (Singer); CV Exh. 721 ¶¶ 27, 35.

⁶⁰⁴ GSN Exh. 301 ¶¶ 86-92 (Singer).

⁶⁰⁵ Tr. 1067:14-17 (Singer).

⁶⁰⁶ Tr. 1067:18-24 (Singer).

⁶⁰⁷ See *supra*, ¶¶ 190, 193.

199. Moreover, as Mr. Orszag explained in his testimony, Dr. Singer's analysis of a WE tv retiering cannot be conducted in any reliable way. Whereas the GSN retiering provides an actual example that can inform an economic analysis, the WE tv retiering is purely hypothetical and devoid of associated data.⁶⁰⁸ It is, therefore, impossible to quantify reliably a WE tv retiering on an *ex post* basis.⁶⁰⁹ In addition, Dr. Orszag explained that Dr. Singer had not, in fact, used the same model to estimate GSN churn and hypothetical WE tv churn, which changed the result of Dr. Singer's analysis in a material way.⁶¹⁰ After applying Dr. Singer's flawed model consistently to both GSN and WE tv, Mr. Orszag found that a hypothetical WE tv retiering would have resulted in 44% more harmful churn to Cablevision than the actual GSN retiering did.⁶¹¹ Dr. Singer's conclusion that Cablevision would have profited more from retiering WE tv therefore is not based on any credible analysis.

B. Evidence of How Other MVPDs Carry GSN Is Not Proof of Discrimination by Cablevision

200. GSN maintains that evidence of Cablevision's discrimination can be gleaned from the fact that other MVPDs grant GSN broader carriage than that afforded by Cablevision. But as Mr. Orszag testified, GSN rests its argument on a flawed "peer group" that excludes a number of MVPDs that are more comparable in size to Cablevision than the MVPDs such as Comcast (eight times larger than Cablevision) that make up GSN's self-defined peer

⁶⁰⁸ Tr. 2563:24-2564:5 (Orszag); CV Exh. 334 ¶ 253 (Orszag).

⁶⁰⁹ Tr. 2564:6-2564:19 (Orszag); CV Exh. 334 ¶ 253 (Orszag).

⁶¹⁰ Tr. 2563:5-18 (Orszag); CV Exh. 334 ¶ 255 (Orszag).

⁶¹¹ Tr. 2563:19-23 (Orszag); CV Exh. 334 ¶ 256 (Orszag); GSN 67 (reflecting that Cablevision treated Mediacom as a peer when it was considering the retiering of GSN).

group.⁶¹² In fact, MVPDs that are of a similar size to, or slightly smaller size than, Cablevision (such as _____ carry GSN at similar penetration rates, or not at all.⁶¹³

201. Even within Dr. Singer's litigation-defined MVPD "peer group," Cablevision was not the only MVPD to carry GSN on its sports tier. Although GSN witnesses testified that Cablevision's decision to carry GSN on its sports tier was "particularly inappropriate" and "entirely out of step with the rest of the marketplace,"⁶¹⁴ in fact Time Warner Cable carried GSN on its sports tier for more than _____ million of its subscribers prior to April of 2010.⁶¹⁵

202. At the hearing, Mr. Goldhill suggested that GSN's broad carriage on Time Warner Cable was restored following discussions between the parties.⁶¹⁶ However, contemporaneous GSN documents show that GSN was able to convince Time Warner Cable to restore broad carriage only after _____ threatening litigation, paying over _____ dollars, and offering _____ on certain Time Warner Cable systems.⁶¹⁷ Accordingly, Cablevision's decision to carry GSN on a sports tier was no outlier, and no inference of discrimination is warranted.⁶¹⁸

⁶¹² See CV Exh. 270 (SNL Kagan "Global Multichannel Top Operators" chart).

⁶¹³ Tr. 2549:22-2550:18 (Orszag); CV Exh. 334 ¶ 29, ¶ 156 n.193 (Orszag).

⁶¹⁴ See GSN Exh. 297 ¶ 30 (Goldhill); GSN Exh. 303 ¶ 20 (Hopkins).

⁶¹⁵ CV Exh. 618 (Apr. 29, 2010 email from Mr. Gillespie to Mr. Goldhill announcing that "Time Warner has converted all of the sports tier distribution of GSN to digital basic carriage resulting in additional subscribers.").

⁶¹⁶ See Tr. 330:6-331:14; 499:8-21 (Goldhill).

⁶¹⁷ See CV Exh. 34 at 3 (Nov. 16, 2007 GSN presentation regarding Time Warner Cable);

203. Cablevision's decision to carry WE tv broadly also was consistent with the market's treatment of the network. WE tv is a broadly distributed cable network, and, unlike GSN, has never been carried on any MVPD's sports tier.⁶¹⁹ Although GSN's experts have asserted that Cablevision should have retiered WE tv rather than GSN,⁶²⁰ such a decision would, in fact, have been entirely out of step with the marketplace. As Dr. Singer conceded, if Cablevision had retiered WE tv, "it would have been acting differently than all of these cable operators who are not affiliated with WE [tv]."⁶²¹ Section 616 imposes no such requirement.

VIII. GSN HAS NOT PROVEN THAT CABLEVISION'S RETIERING WAS AN UNREASONABLE RESTRAINT ON GSN'S ABILITY TO COMPETE FAIRLY

204. As set forth at length in Cablevision's motion for summary decision, GSN has no cause to complain that the Cablevision retiering unreasonably restrained GSN's ability to compete fairly. The evidence at trial confirmed that, since the retiering, GSN has had unprecedented success, and certainly has not been unreasonably restrained in its ability simply to compete fairly.

⁶¹⁸ Cablevision's decision was also consistent with GSN's promotional materials, which advertised the network as targeting sports viewers. *See, e.g.*, CV Exh. 77 at 8 (2009 GSN Presentation to the New York Giants, claiming that GSN's "Adult 25-54 Viewers are Sports Fanatics"); CV Exh. 132 at 10-12 (2010 GSN presentation to DIRECTV, claiming that GSN viewers are "super fans" of various sports, "regularly watch sporting events on TV!", and "will pay extra for Pay-Per-View and sports programming").

⁶¹⁹ *See, e.g.*, Tr. 1076:12-14, 1077:1-2 (Singer).

⁶²⁰ GSN Exh. 301 ¶¶ 88-92 (Singer) (claiming that Cablevision sacrificed profits by retiering GSN rather than WE tv).

⁶²¹ Tr. 1077:3-7 (Singer); *see also* CV Exh. 334 ¶¶ 251-56 (Orszag).

A. GSN Is a Broadly Distributed Network that Competes in the National Marketplace for Video Programming Distribution

205. GSN is a “broadly distributed cable television network” with an average penetration rate on its affiliates.⁶²² GSN has more than penetration on a number of major MVPDs, including⁶²³

B. GSN Has Thrived Since the Retiering

206. Since it was retiered by Cablevision, GSN has been successful in every relevant way.

207. GSN has significantly more subscribers today than it did in 2010. Prior to the retiering, GSN had approximately million subscribers.⁶²⁴ Since the retiering, GSN has enjoyed substantial subscriber growth. According to GSN’s head of distribution, the network has gained approximately million subscribers.⁶²⁵ As a result, GSN now has nearly million subscribers.⁶²⁶

208. Although GSN lost approximately subscribers in the immediate aftermath of the retiering (less than of GSN’s customer base at the time), Mr. Zaccario conceded that any harm associated with that loss was “sort of a . . . hiccup” that ended

⁶²² Tr. 185:8 (Goldhill); Tr. 597:20-598:9 (Hopkins).

⁶²³ Tr. 597:20-598:9 (Hopkins).

⁶²⁴ See CV Exh. 256 at 5.

⁶²⁵ Tr. 609:16-610:3, 692:21- 693:7 (Hopkins).

⁶²⁶ CV Exh. 256 at 5.

once GSN reached million subscribers.⁶²⁷ Today, as GSN recently told advertisers at its 2014-15 upfront presentation, GSN is 28

209. While acknowledging this large growth in subscribers, GSN has argued that the retiering unreasonably restrained GSN from competition in the New York DMA.⁶²⁹ The argument largely rests on the testimony of GSN’s expert, Mr. Brooks, but his analysis suffers from methodological flaws that render it unreliable. Most fundamentally, Mr. Brooks fails to distinguish between correlation (*i.e.*, that there was an increase in the ratings of women’s networks in the New York DMA in the year after the retiering) and causation (*i.e.*, a causal link between the retiering and these changes).⁶³⁰ Mr. Brooks acknowledged, for example, that he did not speak to anybody at GSN about GSN’s ratings,⁶³¹ did not review internal GSN documents 632 and considered such evidence—including

—to be irrelevant.⁶³³ The subjective views of GSN’s expert witness should not be substituted for the contemporary statements of GSN employees. In any event, Mr. Brooks’s

⁶²⁷ Tr. 741:10-742:7, 742:20 (Zaccario).

⁶²⁸ CV Exh. 325 at 7. In that same presentation, GSN contrasted itself with

Id.

⁶²⁹ See, e.g., Tr. 1159:3-8 (Brooks); GSN Exh. 317.

⁶³⁰ See GSN Exh. 300 ¶ 47 (Brooks); CV Exh. 334 ¶ 46 n.33 (Orszag).

⁶³¹ Tr. 1296:25-1297:2 (Brooks).

⁶³² Tr. 1297:5-1298:4 (Brooks).

⁶³³ Tr. 1297:3-4 (Brooks); see also CV Exh. 193 at 49-50; CV Exh. 502 at 1 (Jan. 5, 2012 email from John Zaccario stating that GSN’s poor performance in 2011 was “attributable to ratings performance . . . the poor ratings killed us.”).

testimony showed that GSN's national and local ratings were the same in 2010 and 2013.⁶³⁴ A temporary ratings decrease is not evidence that GSN has been "unreasonably restrained."

210. GSN has significantly expanded its distribution since the retiering. When Mr. Goldhill joined GSN in 2007, the network already had approximately million subscribers, and Mr. Goldhill was "not concerned about the security of distribution" in light of the subscriber base.⁶³⁵ Since the retiering, according to Mr. Goldhill, "[n]o other affiliate has ever threatened to drop GSN, and several continue to grow [GSN's distribution]."⁶³⁶ In fact, GSN has maintained or expanded its distribution with every major MVPD.⁶³⁷

211. At the hearing, GSN attempted to downplay its distribution success in two ways, neither of which is credible. First, GSN witnesses testified that, because other MVPDs referred to the retiering during subsequent carriage negotiations, GSN would have grown even more if Cablevision had not reduced its carriage.⁶³⁸ But while GSN's witnesses identified four MVPDs whose representatives allegedly mentioned the Cablevision retiering—

—Mr. Goldhill and Ms. Hopkins acknowledged that GSN has concluded new agreements with each of these MVPDs and maintained or expanded its carriage in each case.⁶³⁹

⁶³⁴ Tr. 1324:23-1325:14 (Brooks); GSN Exh. 300 ¶¶ 20, 36 (Brooks); GSN Exh. 313.

⁶³⁵ Tr. 213:13-24 (Goldhill).

⁶³⁶ Tr. 219:9-12 (Goldhill); *see also* Tr. 607:19-21 (Hopkins).

See CV Exh. 256 at 5-6, 20 (Mar. 25, 2012 letter from GSN's counsel supplementing GSN's interrogatory responses).

⁶³⁷ *See* CV Exh. 256 at 3-4; Tr. 694:4-21 (Hopkins) (testifying that GSN has concluded new deals with since 2011).

⁶³⁸ *See, e.g.*, Tr. 407:15-408:13 (Goldhill); Tr. 607:19-608:9 (Hopkins) (testifying that other MVPDs are "looking at the situation and seeing how Cablevision behaves").

⁶³⁹ *See* Tr. 408:14-410:3 (Goldhill); Tr. 694:4-21 (Hopkins). Absent supporting evidence, there is no reason to credit Mr. Goldhill's testimony that GSN has maintained or expanded its distribution only

212. Second, GSN suggested that while it has expanded its distribution since the retiering, it has done so only because this litigation has prevented other MVPDs from retiering the network.⁶⁴⁰ This argument is speculative and unsupported by the record. GSN's witnesses acknowledged that "[n]o one has ever told [GSN] that they were watching this case so they could retier you."⁶⁴¹ GSN's argument is also inconsistent with the carriage agreements it has signed since the retiering, some of which run through ⁶⁴² Further, many of the other MVPDs with whom GSN has renewed carriage agreements are not affected by the requirements of Section 616. For example,

are not subject to these program carriage rules, and if they chose to drop GSN the only constraint would be their affiliation agreements, not the outcome of this case. No credible evidence supports GSN's assertion that

213. GSN has enjoyed significant financial success since the retiering. Although GSN lost million in annual subscriber fees as a result of the retiering, and claims it has lost up to an additional in annual advertising revenues, GSN's

by "renew[ing] at effectively declining rates," or his testimony that unspecified MVPDs have paid higher fees for some of GSN's unspecified competitors during the same time period. Tr. 523:11-524:16 (Goldhill). Indeed, because networks and MVPDs both treat carriage rates and terms a secret, there is no way that Mr. Goldhill could even know what rates GSN's competitors are being paid, or by whom.

⁶⁴⁰ See, e.g., GSN Exh. 297 ¶ 34 (Goldhill) ("I believe that filing the instant litigation likely had the effect of forestalling some of the harm. GSN continues to grapple with the possibility that Cablevision's tiering decision will trigger a domino effect among other distributors in the industry.").

⁶⁴¹ Tr. 694:1-3 (Hopkins).

⁶⁴² See, e.g.,

overall financial performance remains strong.⁶⁴³ GSN's television revenue has

In addition, the most recent GSN financial statements produced in this litigation show that GSN has approximately million in unrestricted cash,⁶⁴⁵ and GSN has spent more than million on acquisitions since the retiering.⁶⁴⁶ Finally, GSN has paid out more than million in annual dividends to its corporate parents, Sony and DIRECTV, since the retiering.⁶⁴⁷

214. GSN has expanded its original programming since the retiering. As Mr. Goldhill testified at trial, GSN has "meaningfully increased the amount and quality . . . of its original programming since 2007," and has "more than doubled our investment in original programming" since the retiering.⁶⁴⁸ Although Mr. Goldhill testified that the loss of

in annual revenue allegedly caused by the retiering "dramatically impacts" GSN's ability to invest in programming,⁶⁴⁹ he conceded that GSN has spent more on new programming each year since the retiering.⁶⁵⁰ For example, GSN's 2014 budget included a increase

⁶⁴³ See GSN Exh. 297 ¶ 31 (Goldhill). At trial, Mr. Goldhill acknowledged that this analysis was "not a particularly complex calculation." Tr. 377:10-11 (Goldhill).

⁶⁴⁴ See Tr. 382:22-384:1 (Goldhill); *see also* CV Exh. 262 at 4 (GSN 2013 Review & 2014 Budget presentation).

⁶⁴⁵ Tr. 396:20-23 (Goldhill).

⁶⁴⁶ Tr. 398:22-25 (Goldhill); *see also* CV Exh. 263 at 4 (GSN's 2013-14 consolidated financial statements).

⁶⁴⁷ Tr. 400:18-401:7 (Goldhill). The Presiding Judge should not credit Mr. Goldhill's suggestion, made for the first time at trial, that

⁶⁴⁸ Tr. 197:3-5, 385:1-2 (Goldhill).

⁶⁴⁹ Tr. 391:11-18 (Goldhill).

⁶⁵⁰ Tr. 391:23-392:1 (Goldhill).

in programming expenditures as part of a

651

215. At the hearing, GSN's witnesses also suggested a new argument: that GSN's growing investment in original programming actually is evidence of harm caused by the retiering.⁶⁵² In addition to it being entirely counter-intuitive—GSN touts its investment in original programming as an asset⁶⁵³—the record does not support this new theory. Mr. Goldhill acknowledged that the retiering was neither the “sole reason” nor the “primary reason” GSN invested in original programming.⁶⁵⁴ The record also reflects that GSN's ratings were declining during part of this period due to poorly-received original programming, and that the increase in programming expenditures was not separate from Mr. Goldhill's post-2007 strategy of increasing original programming.⁶⁵⁵

216. GSN's advertising revenues have grown since the retiering from approximately million in 2010 to million in 2013.⁶⁵⁶ According to Mr. Goldhill, this shift reflects GSN's strategy of growing

⁶⁵¹ See CV Exh. 262 at 14-15; *see also* CV Exh. 287 at 1 (Apr. 9, 2013 GSN press release discussing “impressive development slate representing GSN's ongoing commitment to originals”); CV Exh. 297 at 1 (Mar. 21, 2014 GSN press release, stating that “[i]n the coming year, GSN plans to ramp up its commitment to original content, a strategy which helped re-write the network's ratings record book this past year.”); CV Exh. 295 (Nov. 18, 2014 GSN press release, discussing GSN's “aggressive original programming initiative”).

⁶⁵² *See, e.g.*, Tr. 384:10-11 (Goldhill) (testifying that GSN ramped up its investment in original programming “in response to the vulnerability we felt because of the retiering”).

⁶⁵³ CV Exh. 162 at 4.

⁶⁵⁴ Tr. 386:4-5, 387:8-15 (Goldhill).

⁶⁵⁵ Tr. 522:21-523:5 (Goldhill).

⁶⁵⁶ *See* CV Exh. 256 at 10.

⁶⁵⁷ Although GSN has repeatedly suggested that the loss of viewership in Cablevision's New York footprint is damaging because of the need to reach advertising buyers, Mr. Zaccario identified only a few advertisers—
 who allegedly reduced their advertising as a result of the retiering.⁶⁵⁸ The evidence shows that two of these advertisers—
 —did not even advertise on GSN before the retiering.⁶⁵⁹ In addition, Mr. Zaccario acknowledged that sophisticated New York-based ad buyers should have televisions in their offices,⁶⁶⁰ that they could view GSN's sizzle reels,⁶⁶¹ and that those who were Cablevision subscribers could pay \$6.95 per month to receive GSN on the Sports & Entertainment tier.⁶⁶² With one exception, GSN did not think access to ad buyers in the New York DMA was sufficiently important to reimburse the Sports & Entertainment tier fees for the ad buyers who allegedly lost access to GSN because of the retiering.⁶⁶³

217. Finally, Dr. Singer attempted to show through a regression analysis that GSN experienced a greater loss in advertising revenue as a result of the retiering; specifically, he testified that there was a "decline" in GSN's general rate advertising attributable to the retiering.⁶⁶⁴ Mr. Orszag, however, testified that Dr. Singer's calculation is unreliable because it

⁶⁵⁷ See Tr. 563:16-564:5 (Goldhill).

⁶⁵⁸ Tr. 742:21-743:22, 844:19-23 (Zaccario).

⁶⁵⁹ Tr. 853:21-856:18 (Zaccario). On redirect examination, GSN's counsel elicited testimony from Mr. Zaccario suggesting that
 may have made additional "direct response" advertising purchases on GSN prior to the retiering. Tr. 856:24-857:10 (Zaccario). The advertising data GSN presented at trial show no direct response advertising purchase by either client between 2008 and 2012. See GSN Exh. 174 at 12-23.

⁶⁶⁰ Tr. 754:3-11 (Zaccario).

⁶⁶¹ Tr. 754:16-19 (Zaccario).

⁶⁶² Tr. 754:20-23 (Zaccario).

⁶⁶³ Tr. 756:7-757:5 (Zaccario).

⁶⁶⁴ Tr. 913:11-915:10 (Singer); GSN Exh. 301 ¶ 102 (Singer).

accounts solely for general rate advertising, which was only approximately of GSN's total advertising revenue during the period Dr. Singer measured.⁶⁶⁵ According to Mr. Orszag, if Dr. Singer's model is changed to incorporate all of GSN's advertising data—not just the selected general rate data—it shows that the retiering had no effect on GSN's advertising revenues.⁶⁶⁶ Moreover, the record evidence shows that any meaningful advertising losses GSN suffered in 2011 were due to GSN being “killed” by poor ratings.⁶⁶⁷

C. Cablevision Does Not Have Sufficient Market Power in the New York DMA to Unreasonably Restrain GSN

218. Although GSN contends that Cablevision has market power in the New York DMA, its expert economist offered no analysis of the relevant market or market power at trial.⁶⁶⁸ Contrary to GSN's unsupported assertions, the trial record established that the New York DMA is an “intensely competitive environment,”⁶⁶⁹ and that Cablevision lacks sufficient market power to restrain GSN from competing within that market.⁶⁷⁰ In the New York DMA, AT&T, DIRECTV, DISH and Verizon collectively have well over two million subscribers, many of whom live in Cablevision's footprint and have chosen to forego Cablevision service in favor of its competitors.⁶⁷¹ Verizon alone has added almost 500,000 subscribers in the New York DMA

⁶⁶⁵ Tr. 2564:20-2565:9 (Orszag).

⁶⁶⁶ Tr. 2565:10-19 (Orszag); *see also* CV Exh. 334 ¶¶ 175-76 (Orszag).

⁶⁶⁷ CV Exh. 502 at 1; Tr. 806:4-807:4 (Zaccario).

⁶⁶⁸ *See* CV Exh. 301 ¶ 108 (Singer). Dr. Singer said that “[a]ny decision to discriminate in favor of an affiliated network . . . is a local one.” *Id.* Dr. Singer did not offer an opinion about whether Cablevision had sufficient market power to “generate anticompetitive effects.” *Id.* ¶ 109.

⁶⁶⁹ GSN Exh. 345 at 10 (Cablevision Form 2014 10-K).

⁶⁷⁰ GSN Exh. 175 at 21; CV Exh. 271.

⁶⁷¹ CV Exh. 271; CV Exh. 337 ¶ 31 (Montemagno); Tr. 1510:2-25 (Montemagno).

in the last five years, while Cablevision has lost more than ⁶⁷² In addition, over-the-top television options like Netflix, Hulu, and Apple TV provide viewers access to video content at lower subscription costs.⁶⁷³ In the past, Cablevision’s in-market competitors have often run ad campaigns targeting Cablevision customers when Cablevision lost access to popular programming.⁶⁷⁴ Mr. Orszag testified that Cablevision “doesn’t have the type of market power that rises to a competition issue,” because “there are so many substitutes now for people sitting within the Cablevision footprint, [that] Cablevision’s ability to exercise market power has been handcuffed.”⁶⁷⁵

PROPOSED CONCLUSIONS OF LAW

219. In its carriage complaint, GSN claims that Cablevision discriminated against it on the basis of its affiliation in favor of Cablevision’s affiliated networks WE tv and Wedding Central in violation of Section 616 of the Communications Act and Section 76.1301(c) of the Commission Rules.⁶⁷⁶ The Media Bureau designated two issues for hearing before the Presiding Judge:

- (a) To determine whether Cablevision has engaged in conduct the effect of which is to unreasonably restrain the ability of GSN to compete fairly by discriminating in video programming distribution on the basis of the complainant’s affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by GSN, in violation of

⁶⁷² CV Exh. 337 ¶ 31 (Montemagno); GSN Exh. 175 at 22; CV. Exh. 271.

⁶⁷³ CV Exh. 337 ¶ 32 (Montemagno).

⁶⁷⁴ Tr. 1516:11-17 (Montemagno).

⁶⁷⁵ See Tr. 2688:8-10, 2689:14-17 (Orszag). Although GSN elicited testimony from two Cablevision witnesses—Mr. Dolan and Mr. Montemagno—that Cablevision had some degree of market power within the New York DMA, such testimony cannot substitute for rigorous economic analysis, which GSN failed to provide at the hearing. *Contra* Tr. 1544:1-14 (Montemagno); Joint Exh. 3 at 11:3-12:4 (Dolan).

⁶⁷⁶ 47 C.F.R. § 76.1301(c).

Section 616(a)(3) of the Act and/or Section 76.1301(c) of the Commission's Rules; and

(b) In light of the evidence adduced pursuant to the foregoing issue, to determine whether Cablevision should be required to carry GSN on its cable systems on a specific tier or to a specific number or percentage of Cablevision subscribers and, if so, the price, terms, and conditions thereof; and/or whether Cablevision should be required to implement such other carriage-related remedial measures as are deemed appropriate.⁶⁷⁷

220. Complainant GSN bears the burden of proof at trial. As described in detail in the Proposed Findings of Fact, GSN has failed to discharge this burden.

IX. GSN HAS THE BURDEN OF PROVING EACH ELEMENT OF ITS CLAIM

221. As the complainant in this Section 616 case, GSN bears the burden of proving by a preponderance of evidence that, in making the decision to retier GSN, defendant Cablevision discriminated against it on the basis of affiliation.⁶⁷⁸ To satisfy this burden, GSN must present either direct evidence of such discrimination or circumstantial evidence supporting an inference that such discrimination occurred.⁶⁷⁹

222. To satisfy its burden of proving direct evidence of discrimination, GSN must come forward with documentary or testimonial evidence showing that, in making the decision to retier GSN, Cablevision discriminated on the basis of its non-affiliation with GSN.⁶⁸⁰

In past rulings, the Commission has identified the following types of direct evidence that are

⁶⁷⁷ *Game Show Network, LLC v. Cablevision Sys. Corp.*, Hr'g Designation Order & Notice for Opportunity for Hr'g for Forfeiture, 27 FCC Rcd. 5113, 5136-37 (MB 2012) (hereinafter "HDO").

⁶⁷⁸ *See Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Initial Decision, 26 FCC Rcd. 17160, 17204 (ALJ 2011) (citing *WealthTV*, 24 FCC Rcd. at 12995); *see also Game Show Network, LLC v. Cablevision Sys. Corp.*, Mem. Op. & Order, MB Docket No. 12-222, FCC 15M-23, ¶ 5 (June 19, 2015) (noting "the burden of proof which GSN . . . would have in a full trial on the merits").

⁶⁷⁹ *See Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report & Order, 26 FCC Rcd. 11494, 11504 (2011) (hereinafter "Second Report & Order").

⁶⁸⁰ *See HDO*, 27 FCC Rcd. at 5119-20.

probative of discrimination: “an email from the defendant MVPD stating that the MVPD took an adverse carriage action against the complainant programmer because it is not affiliated with the MVPD,” and testimony from a representative of the programmer “detailing the facts supporting a claim that a representative of the defendant MVPD informed the complainant programmer that the MVPD took an adverse carriage action” based on non-affiliation.⁶⁸¹

223. Absent conclusive direct evidence of discrimination, GSN must meet its burden by demonstrating through a preponderance of circumstantial evidence both (i) that GSN is “similarly situated” to a network affiliated with Cablevision, and (ii) that Cablevision has treated GSN differently from its affiliated network with respect to the selection, terms, or conditions of carriage.⁶⁸² Under the Commission’s regulations, factors that are relevant to a determination of whether two networks are similarly situated include: genre, ratings, license fee, target audience, target advertisers, and target programming.⁶⁸³

224. Even if GSN is able to demonstrate that it is similarly situated to one of Cablevision’s affiliated networks, GSN must also prove that its unaffiliated status “actually motivated” Cablevision’s decision.⁶⁸⁴ Although GSN need not use direct evidence (such as testimony from an MVPD that a decision was motivated by affiliation), GSN must come forward with circumstantial evidence to prove that its affiliation status “played a role in the process and

⁶⁸¹ HDO, 27 FCC Rcd. at 5120 n. 54 (citing Second Report & Order at 11503-4).

⁶⁸² 47 C.F.R. § 76.1302(d)(3)(iii)(B); *see also* Second Report & Order at 11504.

⁶⁸³ Second Report & Order at 11504; *see also, e.g., WealthTV*, 24 FCC Rcd. at 12976-12984. The Commission, in an example concerning the similarity of two music channels, suggests that the use of the license fee and ratings factors are not meant to demonstrate similarity on a standalone basis, but rather can distinguish between networks in an instance where the two networks based on other factors, such as programming similarity, appear to be similarly situated. Second Report & Order at 11504.

⁶⁸⁴ *See WealthTV*, 24 FCC Rcd. at 12997.

had a determinative influence on the outcome.”⁶⁸⁵ Therefore, the presence of “legitimate reasons for” Cablevision’s carriage decision, “borne out by the record and not based on the programmer’s affiliation or non-affiliation,” preclude a finding of discrimination.⁶⁸⁶ The Court and Commission have recognized in past cases that legitimate business reasons for an adverse carriage decision include a lack of subscriber demand for and interest in the network, the cost of carriage, unfavorable terms and conditions of carriage, lack of appeal to advertisers and better alternative options.⁶⁸⁷

225. Although not “alter[ing] the evidentiary standards by which a complainant shows a violation of Section 616,”⁶⁸⁸ the D.C. Circuit Court of Appeals’ decision in the *Tennis Channel* case confirms that, as part of GSN’s required showing that Cablevision lacked a good-faith business reason for its retiering decision, GSN must prove that Cablevision would have benefited from maintaining GSN’s carriage on a broadly-penetrated tier.⁶⁸⁹ Absent such a showing, GSN cannot, as a matter of law, satisfy its burden of proving circumstantial evidence of Cablevision’s discriminatory intent.⁶⁹⁰

226. If it can establish impermissible discrimination, GSN has the additional

⁶⁸⁵ *WealthTV*, 24 FCC Rcd. at 12998.

⁶⁸⁶ See *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Mem. Op. & Order, 25 FCC Rcd. 18099, 18105 (MB 2010); see also *Comcast Cable Commc’ns, LLC v. FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013) (hereinafter “*Tennis Channel*”) (“Thus, if the MVPD treats vendors differently based on a reasonable business purpose (obviously excluding any purpose to illegitimately hobble the competition from Tennis), there is no violation.”).

⁶⁸⁷ See *TCR Sports Broad.*, 25 FCC Rcd. at 18104, 18106, 18111-12 (noting subscriber demand, costs of carriage and bandwidth, and decisions of other cable operators as legitimate factors); *WealthTV*, 24 FCC Rcd. at 12999 (noting terms and conditions of carriage and alternative options as relevant factors).

⁶⁸⁸ *Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, Order, 30 FCC Rcd. 849, 851-52 (MB 2015).

⁶⁸⁹ *Tennis Channel*, 717 F.3d at 986.

⁶⁹⁰ See *id.* at 987.

burden of proving that Cablevision's adverse carriage decision unreasonably restrained GSN's ability to compete fairly.⁶⁹¹ As the Commission has recognized in interpreting this provision, "Section 616 . . . appl[ies] only where an anticompetitive impact is shown in a particular case."⁶⁹² The pertinent consideration is whether the lack of broader carriage on the MVPD limits the ability of the unaffiliated network to compete over the long term.⁶⁹³

227. This assessment is made "based on the impact of the defendant MVPD's adverse carriage action on the programming vendor's subscribership, license fee revenues, advertising revenues, ability to compete for advertising and programming, and ability to realize economies of scale."⁶⁹⁴ GSN cannot satisfy its burden "merely by showing that the defendants' individual carriage decisions adversely affected its competitive position in the marketplace."⁶⁹⁵ Section 616 "demand[s] proof of the significant or material detrimental effect implicit in the term 'unreasonable restraint.'"⁶⁹⁶ Whether GSN, as a national programming network, has been

⁶⁹¹ See 47 C.F.R. § 76.1301(c).

⁶⁹² Br. of Fed. Comm. Commission at 42, *Time Warner Cable Inc. v. FCC*, 729 F.3d 137 (2d Cir. 2013) (No. 11-4138); see also *Time Warner Cable*, 729 F.3d at 164 (Section 616 "prohibits only affiliation-based discrimination by MVPDs and only when such discrimination is shown to have an anticompetitive effect").

⁶⁹³ See *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Mem. Op. & Order, 27 FCC Rcd. 8508, 8539-40 (2012) (finding harms imposed on Tennis Channel by Comcast's tiering decision were "of such a magnitude that they clearly restrain Tennis Channel's ability to compete fairly with similarly situated networks"); *TCR Sports Broad. Holding, LLP v. Comcast Corp.*, Mem. Op. & Hr'g Designation Order, 21 FCC Rcd. 8989, 8994 (2006) ("TCR argues that without carriage by Comcast, it will be impossible for MASN to reach the necessary level of subscribership to achieve long-term financial viability, and that Comcast's refusal to carry MASN thus restrains TCR from competing fairly.").

⁶⁹⁴ Second Report & Order at 11505 n.60 (citing decisions by Media Bureau). Tellingly, GSN did not mention any lost "economies of scale" in its trial brief or in opposition to Cablevision's summary decision motion in this action.

⁶⁹⁵ *WealthTV*, 24 FCC Rcd. at 13002.

⁶⁹⁶ See *Time Warner Cable*, 729 F.3d at 166; see also *Tennis Channel*, 717 F.3d at 991-92 (Kavanaugh, J., concurring) (concluding that while Section 616 "references discrimination against competitors . . . [it] does not ban such discrimination outright"). In his *Tennis Channel* concurrence, Judge

unreasonably restrained in its “ability to compete” is to be judged based on its performance in the national market, consistent with the Commission’s findings in past carriage cases.⁶⁹⁷

X. GSN HAS NOT MET ITS BURDEN OF PROVING THAT CABLEVISION DISCRIMINATED ON THE BASIS OF AFFILIATION

228. GSN has not presented sufficient direct evidence or circumstantial evidence establishing that Cablevision discriminated against GSN on the basis of affiliation. To the contrary, the record reflects that Cablevision made the decision to retier GSN for legitimate, non-discriminatory, cost-saving reasons having nothing whatsoever to do with benefiting Cablevision’s affiliated networks.

A. GSN Has Not Presented Any Probative Direct Evidence of Discrimination

229. The Commission has set out the type of proof that constitutes direct evidence in a carriage discrimination claim: contemporaneous documents or sworn testimony establishing that the defendant MVPD either expressly made its carriage decision in order to benefit an affiliated network or informed the complaining network that its carriage decision was based on affiliation.⁶⁹⁸

230. GSN failed to introduce any such evidence of direct discrimination. No document shows that Cablevision decided to retier GSN because it was unaffiliated with

Kavanaugh emphasized that Section 616 “applies only to discrimination that amounts to an unreasonable restraint under antitrust law,” and thus, discrimination “become[s] potentially problematic . . . only when a video programming distributor possesses market power.” *Id.* at 988, 992. Cablevision acknowledges the Presiding Judge’s finding in an earlier case that “arguments that antitrust standards are encased in sections 616 and 76.1301(c) are unpersuasive,” *WealthTV*, 24 FCC Rcd. at 13001, but respectfully submits that in light of *Tennis Channel*, this analysis is not consistent with the law of Section 616 claims. *See id.* at 991 n.1 (Kavanaugh, J., concurring) (“Cable Act provisions such as Section 616 that mirror existing antitrust proscriptions serve an important regulatory purpose, akin to adding new police officers to enforce an existing law.”). In all events, under either analytical framework, GSN has suffered no unreasonable restraint.

⁶⁹⁷ *See Tennis Channel*, 27 FCC Rcd. at 8539-42.

⁶⁹⁸ *See HDO*, 27 FCC Rcd. at 5119-20 n.54 (citing Second Report & Order at 11503-4).

Cablevision. The Presiding Judge heard testimony from six GSN fact witnesses (either live or by deposition), including four—Ms. Hopkins, Mr. Chang, Mr. Gillespie, and Mr. Goldhill—who spoke directly to Cablevision representatives concerning the GSN retiering. None of these witnesses testified that he or she was ever told by anyone at Cablevision that the retiering decision was based on GSN’s affiliation.⁶⁹⁹ No Cablevision witness who appeared at the hearing, either live or by deposition, testified that the decision to retier GSN had anything to do with GSN’s affiliation.⁷⁰⁰ To the contrary, they gave credible and un rebutted testimony that Cablevision’s affiliated networks, including WE tv and Wedding Central, were never discussed, considered, or even mentioned in the decision-making process leading to the GSN retiering.⁷⁰¹ For his part, Mr. Montemagno never considered GSN to be a women’s network: he testified that it never occurred to him to put GSN in the same channel neighborhood as WE tv or other women’s networks, and that GSN’s presentation to Cablevision in 2009 confirmed that the network was focused on game show programming.⁷⁰² No representative from Rainbow or WE tv was consulted about the GSN retiering; indeed, each of the witnesses employed by Cablevision’s programming affiliate denied knowing about the GSN retiering until after the decision had been made and communicated to GSN.⁷⁰³

231. There is simply no direct evidence of discrimination in this case. A contrary conclusion would require, at the very least, that the Presiding Judge find each of the Cablevision witnesses to be not credible, a finding that is not remotely warranted on this record.

⁶⁹⁹ See Proposed Findings of Fact, *supra*, at ¶ 53.

⁷⁰⁰ See Proposed Findings of Fact, *supra*, at ¶¶ 45, 55.

⁷⁰¹ See Proposed Findings of Fact, *supra*, at ¶¶ 45, 55.

⁷⁰² See Proposed Findings of Fact, *supra*, at ¶¶ 32, 184.

⁷⁰³ See Proposed Findings of Fact, *supra*, at ¶ 56.

232. GSN's contention that the retiering decision was pretextual—because post-retiering discussions between GSN's parent, DIRECTV, and Cablevision's affiliate, Rainbow, included discussion of linking renewed broader Cablevision carriage of GSN to DIRECTV carriage of Wedding Central—is similarly unsupported by the evidence.⁷⁰⁴ In its Hearing Designation Order, the Media Bureau declined to credit these allegations as direct evidence of discrimination.⁷⁰⁵ After three years of discovery and a two-week hearing, it is clear the Media Bureau reached the correct conclusion.

233. First, there is no evidence—just speculation—that Cablevision retiered GSN for the purpose of gaining carriage for Wedding Central on DIRECTV. Not only is there no evidence of such a Cablevision-orchestrated scheme, the evidence shows that it was GSN that first hatched the idea to swap Wedding Central carriage on DIRECTV for a new Cablevision contract for GSN. GSN's executives originated the idea in 2009.⁷⁰⁶ When GSN learned about the retiering decision it dispatched DIRECTV programming chief Derek Chang rather than its own programming executives to try to work a deal with Cablevision to restore carriage.⁷⁰⁷

234. Second, the evidence demonstrates that the discussions between DIRECTV and Rainbow that ensued from Mr. Chang's overture concerned a number of issues, not just carriage of Wedding Central.⁷⁰⁸ When DIRECTV made its final determination that it would not offer carriage to Wedding Central, Cablevision continued to negotiate with GSN's other corporate owner, Sony, to try to reach an agreement that would restore GSN to a broadly-

⁷⁰⁴ See Compl. ¶¶ 25-27, 52-53.

⁷⁰⁵ See HDO, 27 FCC Rcd. at 5135-36.

⁷⁰⁶ See Proposed Findings of Fact, *supra*, at ¶¶ 58-60.

⁷⁰⁷ See Proposed Findings of Fact, *supra*, at ¶¶ 61-62.

⁷⁰⁸ See Proposed Findings of Fact, *supra*, at ¶¶ 63-65.

penetrated tier without any possibility of Wedding Central carriage.⁷⁰⁹ If the whole point of the GSN retiering had been to trade broader carriage of GSN for carriage of Wedding Central on DIRECTV, there would have been nothing for Cablevision to talk about with Sony.

235. In short, the evidence fails to support GSN's contention that Cablevision retiered GSN in order to gain Wedding Central carriage. To the contrary, all that the record shows is that, after making an independent and good faith business decision to retier GSN, Cablevision entertained offers from both of GSN's corporate owners—DIRECTV and Sony—to see if Cablevision could obtain some value that would justify continued broad carriage of GSN at a cost of more than _____ per year. Nothing about these post-retiering negotiations proves discrimination in the decision to carry GSN on a less penetrated tier.

B. GSN Has Not Proven that It Is Similarly Situated to WE tv or Wedding Central

236. Under settled Commission precedent, GSN can establish circumstantial evidence of discrimination only if it meets its “threshold burden of showing” that it is similarly situated to either WE tv or Wedding Central.⁷¹⁰ GSN has not shown that it is similarly situated to one of Cablevision's affiliates under the guidelines the Commission and the Presiding Judge have applied in past rulings: programming genre, ratings, license fee, target audience, target advertisers, and target programming.⁷¹¹

⁷⁰⁹ See Proposed Findings of Fact, *supra*, at ¶¶ 66-67.

⁷¹⁰ See *WealthTV*, 24 FCC Rcd. at 13000.

⁷¹¹ See Second Report & Order at 11504; *WealthTV*, 24 FCC Rcd. at 12977-83 (reviewing the genre, programming, and audience of the networks to assess whether they were similarly situated); *Tennis Channel*, 26 FCC Rcd. at 17170-71 (assessing similarity based on programming, audience, advertising, and ratings).

237. First, the extensive record evidence concerning the programming on GSN and WE tv demonstrates that they target and air markedly different content. As set forth at length in the findings of fact above, GSN was and always has been a network that broadcasts game shows and other programming focused on games and competition. During the period in and around the rebranding, the service descriptions in GSN's carriage agreements

consistent with GSN's portrayal of the network as "the only network dedicated exclusively to games."⁷¹² This made GSN "unique" and set it apart from all cable networks, including women's networks such as WE tv.⁷¹³ By contrast, WE tv contractually committed to

and consistently promoted itself as a network dedicated to women.⁷¹⁴ The evidence considered as a whole cannot remotely support the conclusion that the two networks transmitted similar programming.

238. These differences are reflected in the entirely different genres of programming shown on each network. Cablevision's programming expert, Michael Egan, conducted the same type of extensive genre analysis that the Presiding Judge and Commission credited previously in the *WealthTV* case.⁷¹⁵ Unrebutted testimony from Mr. Egan, as well as GSN and WE tv fact witnesses, demonstrates that during the period surrounding the rebranding GSN devoted virtually its entire programming lineup to game shows, poker programming, and

⁷¹² See Proposed Findings of Fact, *supra*, at ¶¶ 72, 75-84.

⁷¹³ See Proposed Findings of Fact, *supra*, at ¶¶ 76-78.

⁷¹⁴ See Proposed Findings of Fact, *supra*, at ¶¶ 73-75, 85-87.

⁷¹⁵ *WealthTV*, 24 FCC Rcd. at 12977-80; *Herring Broadcast, Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, Mem. Op. & Order, 26 FCC Rcd. 8971, 8975-79 (2011) (Commission opinion affirming initial decision).

other competition shows.⁷¹⁶ WE tv showed only a single failed game show, focusing its programming instead on women-oriented reality shows, scripted comedies and dramas, movies and news documentaries.⁷¹⁷ Mr. Egan also employed the same “look and feel” analysis credited in *WealthTV*,⁷¹⁸ concluding that the networks targeted dramatically different programming.⁷¹⁹ The distinctions in target programming and genres of programming between WE tv and GSN are stark and irrefutable, and compel the conclusion that the networks are not similarly situated.⁷²⁰

239. These programming distinctions are consistent with independent evidence that viewers clearly perceive the differences between the two networks. Cablevision’s survey expert, Hal Poret, testified that the survey he designed and conducted conclusively showed that viewers saw no similarity in the programming on GSN and WE tv.⁷²¹ And Cablevision’s economic expert, Jonathan Orszag, demonstrated through his direct test, switching analyses, and other empirical evidence that GSN and WE tv did not compete for viewers in any significant way.⁷²² If the networks carried similar programming those analyses would have yielded different results.

240. Second, the record shows that WE tv and GSN targeted and delivered different audiences. There is no dispute in this case that WE tv targets an audience of adult

⁷¹⁶ See Proposed Findings of Fact, *supra*, at ¶¶ 89-93, 95-97.

⁷¹⁷ See Proposed Findings of Fact, *supra*, at ¶¶ 89-94.

⁷¹⁸ *WealthTV*, 24 FCC Rcd. at 12977-80.

⁷¹⁹ See Proposed Findings of Fact, *supra*, at ¶¶ 98-102.

⁷²⁰ See Proposed Findings of Fact, *supra*, at ¶¶ 89-102.

⁷²¹ See Proposed Findings of Fact, *supra*, at ¶¶ 105-110.

⁷²² See Proposed Findings of Fact, *supra*, at ¶¶ 166-171.

women 18 to 49 and 25 to 54.⁷²³ WE tv's focus on these female demographics comes through loudly, clearly, and consistently in its carriage agreement service descriptions, presentations to MVPDs and other market participants, and marketing materials.⁷²⁴ The overwhelming weight of credible evidence establishes that GSN does not target the same women's demographics in a singular and focused manner. Nothing in the multiple service descriptions GSN included in its contracts even suggests that it targeted women.⁷²⁵ The record shows that in presentations to MVPDs and other market participants GSN frequently described its target audience as consisting of "people" or "adults"—that is, men and women.⁷²⁶ Credible testimony from former GSN distribution chief, Mr. Gillespie, established that the "broad-based" and "family-friendly" audience GSN sought to attract consisted of "men and women and of all ages."⁷²⁷ Although GSN points to a handful of presentations and other documents suggesting that certain of its programs were designed to reach an audience of women 25 to 54, the bulk of the network's programming was targeted at a broader game-loving audience of adult women and men.⁷²⁸ That GSN occasionally targeted the demographic that comprised the consistent core target of WE tv is simply not sufficient to support the conclusion that the networks are similarly situated.

241. Moreover, much of the evidence GSN relies upon relates to programming aired well after the retiering.⁷²⁹ But the most relevant comparison is the programming and

⁷²³ See Proposed Findings of Fact, *supra*, at ¶ 124.

⁷²⁴ See Proposed Findings of Fact, *supra*, at ¶¶ 73-75, 124-26.

⁷²⁵ See Proposed Findings of Fact, *supra*, at ¶¶ 72-75.

⁷²⁶ See Proposed Findings of Fact, *supra*, at ¶¶ 115-19, 121.

⁷²⁷ See Proposed Findings of Fact, *supra*, at ¶ 116.

⁷²⁸ See Proposed Findings of Fact, *supra*, at ¶ 115-19.

⁷²⁹ See Proposed Findings of Fact, *supra*, at ¶ 118 n.329.

audience of the networks at the time Cablevision made the decision to re-tier GSN. Even if the Presiding Judge were to consider the post-tiering programming of GSN, the evidence falls far short of discharging GSN's burden to show that it targeted the same audience of women 18 to 49 and 25 to 54 targeted by WE tv.⁷³⁰ At most, what the evidence shows is that GSN sought to reach these women's demographics among other demographics in the mixed and varied audience that watched the game show fare on the network.⁷³¹

242. The record also shows that WE tv and GSN delivered very different audiences: the majority of WE tv's viewership consisted of its target demographics of women 18 to 49 and women 25 to 54; by contrast, women and men age 55 and older comprised the majority of GSN's audience.⁷³² Over [REDACTED] of GSN's audience was consistently outside of its purported target demographic of women 25 to 54.⁷³³ Although WE tv's median age among women hovered in the [REDACTED] throughout the relevant time period—squarely within WE tv's target age demographic—GSN's median age among its audience of women and adult viewers was around [REDACTED].⁷³⁴ Within the narrower age range of adults 25 to 54, women comprised the significant majority of WE tv's audience.⁷³⁵ GSN's 25 to 54 year old viewers, on the other hand, consisted of essentially equal numbers of men and women.⁷³⁶ In various presentations to MVPDs and potential advertisers GSN touted data showing the relatively equal gender split of its

⁷³⁰ See *WealthTV*, 24 FCC Rcd. at 12980-83.

⁷³¹ See Proposed Findings of Fact, *supra*, at ¶¶ 115-19.

⁷³² See Proposed Findings of Fact, *supra*, at ¶¶ 127-40.

⁷³³ See Proposed Findings of Fact, *supra*, at ¶¶ 127-29.

⁷³⁴ See Proposed Findings of Fact, *supra*, at ¶¶ 130-32, 134.

⁷³⁵ See Proposed Findings of Fact, *supra*, at ¶ 133.

⁷³⁶ See Proposed Findings of Fact, *supra*, at ¶¶ 129-130.

audience; there is no evidence that WE tv ever portrayed itself in a similar way (nor would there have been any data to support such a portrayal).⁷³⁷ The clear differences between the GSN and WE tv audiences in age and gender preclude any finding that the two networks are similarly situated on this metric.⁷³⁸

243. Third, the record reflects that GSN and WE tv did not target or attract the same advertisers. Advertisers would not view GSN and WE tv as similar because of the different demographic profiles of their audiences, particularly the significant age difference between WE tv viewers and GSN viewers.⁷³⁹ Even GSN's owner, DIRECTV, placed the networks in advertising clusters designed to appeal to advertisers targeting different demographics.⁷⁴⁰ GSN did not present any persuasive evidence to the contrary, instead relying on its own data showing some sales to advertisers targeting the women 25 to 54 demographic, and the testimony of its expert that GSN and WE tv had a certain number of overlapping advertisers.⁷⁴¹ As for GSN's sales in the women 25 to 54 demographic, the evidence shows that these sales only made up a small part of GSN's total advertising revenue.⁷⁴² And Cablevision's experts demonstrated that any advertiser overlap here between GSN and WE tv is not proof that the two networks are similar; it is simply evidence that large corporations advertise on a large

⁷³⁷ See Proposed Findings of Fact, *supra*, at ¶ 119.

⁷³⁸ See *WealthTV*, 24 FCC Rcd. at 12980-83.

⁷³⁹ See Proposed Findings of Fact, *supra*, at ¶¶ 141-48.

⁷⁴⁰ See Proposed Findings of Fact, *supra*, at ¶¶ 155-56.

⁷⁴¹ See Proposed Findings of Fact, *supra*, at ¶¶ 149-53.

⁷⁴² See Proposed Findings of Fact, *supra*, at ¶¶ 151-52.

number of networks including both GSN and WE tv, among many others.⁷⁴³

244. GSN sought at trial to sidestep its inability to prove substantial similarity at the time of the retiering by contending that Cablevision’s carriage decision constitutes an “ongoing violation.”⁷⁴⁴ However, nowhere in the 39-page Complaint or 53-page Reply that GSN submitted to the Media Bureau did GSN allege that Cablevision committed an “ongoing” violation of Section 616.⁷⁴⁵ The allegedly discriminatory acts recited in GSN’s Complaint all focused on the events leading to the retiering and the retiering itself in February 2011.

245. Moreover, GSN has acknowledged that the only relevant question in a case such as this is whether it can demonstrate substantial similarity to an affiliate network at the time of the challenged carriage action. In discrimination cases, which form the foundation for Section 616 cases, courts look to the defendant’s conduct and intent at the time it allegedly discriminated; evidence that post-dates the alleged discrimination has no bearing on whether the defendant violated the law.⁷⁴⁶ GSN itself recognized precisely this point when it objected to producing post-retiering evidence during the parties’ supplemental discovery period. Then, GSN

⁷⁴³ See Proposed Findings of Fact, *supra*, at ¶ 149. See *contra Tennis Channel*, 26 FCC Rcd. at 17180-81 (finding, on the facts of that case, that advertiser overlap was a sign that the networks targeted similar advertisers).

⁷⁴⁴ See Trial Brief of Game Show Network, LLC, June 2, 2015, at 1-2.

⁷⁴⁵ See generally, Compl.; Reply, *Game Show Network, LLC v. Cablevision Systems Corp.* (Jan. 17, 2012).

⁷⁴⁶ *Smith v. United Bhd. of Carpenters & Joiners of Am., A.F.L.*, 685 F.2d 164, 168 (6th Cir. 1982); see also *Chuang v. Univ. of Cal. Davis, Bd. Of Trs.*, 225 F.3d 1115, 1130 (9th Cir. 2000) (“[a defendant employer’s] subsequent hiring practices are therefore irrelevant to the question whether [the plaintiff] was subjected to discrimination from 1982 to 1997”); *Gonzales v. Police Dep’t, City of San Jose*, 901 F.2d 758, 762 (9th Cir. 1990) (“Subsequent hiring or promotion practices are clearly not relevant to the question of whether discrimination occurred prior to the commencement of a [discrimination action].”); *Rice v. Gates Rubber Co.*, 521 F.2d 782, 785 (6th Cir. 1975) (“[T]he crucial issue in a lawsuit of this kind is whether the plaintiff establishes . . . bias at the time of his . . . employment and subsequent complaint to the EEOC, not the employment practices utilized two years later.”) (internal citation omitted).

asserted that “programs aired on GSN in 2012 and 2013 have no bearing on a Complaint that was filed in 2011,” and that post-retiering evidence “would, by virtue of [its] date, have no bearing on the factual and legal issues in this case.”⁷⁴⁷ GSN’s position is consistent with the allegations in its Carriage Complaint, where it claimed that Cablevision had discriminatory intent (masked by “pretextual” business justifications) when it made the decision to retier GSN in late 2010 or early 2011—not months or years later.⁷⁴⁸

246. Despite the irrelevant nature of evidence post-dating Cablevision’s purportedly discriminatory carriage decision, and despite GSN’s protest at trial that this “evidence isn’t going to be our focus” and is “not the core of our case”,⁷⁴⁹ the bulk of the evidence cited by GSN in support of its claim to be similarly situated to WE tv relates to programming aired or developed well after the retiering.⁷⁵⁰ But even if this evidence is given any weight by the Presiding Judge, it falls far short of demonstrating similarity between GSN and WE tv. At most, what this evidence shows is that a handful of programs plucked from GSN’s game show-dominated programming schedule resemble programming that comprised the heart of what was aired on WE tv.⁷⁵¹ Such untimely and unrepresentative evidence is

⁷⁴⁷ See Responses & Objections of Game Show Network, LLC to Cablevision’s Second Request for Production of Documents, June 6, 2014, at 12-15, 17.

⁷⁴⁸ See, e.g., Compl. ¶ 4 (“The real motivation behind Cablevision’s discrimination—and the reason why it repositioned GSN but not other networks . . . is that it concluded that doing so would benefit WE tv and Wedding Central competitively, at GSN’s expense.”), ¶ 46 (“The fundamental incongruence between Cablevision’s purported cost and ratings justifications for negatively repositioning GSN and the actual impact of this action—making GSN unavailable to its core audience—reveals the pretextual nature of these justifications and points to Cablevision’s discriminatory intent.”).

⁷⁴⁹ Tr. 32:18-19 (Opening Statement), 468:21.

⁷⁵⁰ See Proposed Findings of Fact, *supra*, at ¶¶ 140, 140 n. 408; 118 n. 329.

⁷⁵¹ Cf. *WealthTV*, 24 FCC Rcd. at 12979 (rejecting expert testimony concerning programming because “[n]othing in the record establishes that the selection of WealthTV’s programming viewed by [the expert] are representative of WealthTV’s programming as a whole”).

insufficient to discharge GSN's burden of showing similarity between the networks.

C. GSN Has Not Proven that Cablevision's Retiering Decision Lacked a Legitimate, Non-Discriminatory Justification

247. GSN's claim also fails because there is substantial record evidence proving that Cablevision retiered GSN for "legitimate reasons." This evidence precludes a finding that GSN's lack of affiliation "actually motivated" Cablevision's decision.⁷⁵²

248. The Commission has recognized that an MVPD may properly take account of cost considerations, subscriber demand, alternative carriage options and other legitimate business reasons in the course of making a carriage decision.⁷⁵³ If an MVPD treats an unaffiliated network differently based on a "reasonable business purpose . . . there is no violation."⁷⁵⁴

249. Cablevision's non-discriminatory reasons for retiering GSN are memorialized in business documents created in connection with the retiering decision and affirmed by Cablevision's witnesses at trial. Witnesses and contemporaneous documents from both Cablevision and GSN described the extraordinary and increasing cost pressures that cable operators faced in the period leading up to the carriage decision in 2010.⁷⁵⁵ As Cablevision sought out ways to rein in these programming costs in 2010, it conducted an extensive review of

⁷⁵² See *WealthTV*, 24 FCC Rcd. at 12997.

⁷⁵³ See *TCR Sports Broad.*, 25 FCC Rcd. at 18104, 18106, 18111-12 (noting subscriber demand, costs of carriage and bandwidth, and decisions of other cable operators as legitimate factors); *WealthTV*, 24 FCC Rcd. at 12999 (noting terms and conditions of carriage and alternative options as relevant factors).

⁷⁵⁴ *Tennis Channel*, 717 F.3d at 985; see also *TCR Sports Broad. Holding*, 25 FCC Rcd. at 18104.

⁷⁵⁵ See Proposed Findings of Fact, *supra*, at ¶¶ 35-40.

a number of networks it then carried to determine whether it made economic sense to drop or retier them.⁷⁵⁶

250. The record shows that GSN became a candidate for lesser carriage because it was out of contract with Cablevision.⁷⁵⁷ As a result, Cablevision had no contractual impediment to realizing over _____ per year in cost savings by moving an unpopular network to a narrower tier of service.⁷⁵⁸ In assessing whether to take action regarding GSN, Mr. Montemagno drafted a memorandum in July 2010 that comprehensively outlined multiple factors that would inform the ultimate decision to retier GSN—including GSN’s cost, relative unpopularity, contract flexibility, ownership, and subscriber churn potential, among others—and shared it with the executive team responsible for making carriage decisions.⁷⁵⁹ The record also reflects that Cablevision did not single out GSN for consideration. Rather, Cablevision considered whether to drop or retier a number of other networks during its 2011 budget review process (and indeed initially decided to drop one of those networks, _____, in order to cut costs).⁷⁶⁰ After further analysis and discussions over the course of several months, the Cablevision distribution and product teams came to the reasonable and good faith business decision that Cablevision would not drop GSN entirely but rather move it to the Sports & Entertainment tier, where Cablevision could still secure substantial cost savings and the small number of loyal GSN viewers could still obtain access to the network.⁷⁶¹

⁷⁵⁶ See Proposed Findings of Fact, *supra*, at ¶¶ 41, 46-47.

⁷⁵⁷ See Proposed Findings of Fact, *supra*, at ¶¶ 41-42.

⁷⁵⁸ See Proposed Findings of Fact, *supra*, at ¶¶ 42-44.

⁷⁵⁹ See Proposed Findings of Fact, *supra*, at ¶¶ 42-44.

⁷⁶⁰ See Proposed Findings of Fact, *supra*, at ¶¶ 46-47, 49.

⁷⁶¹ See Proposed Findings of Fact, *supra*, at ¶ 48.

251. The process set out by Mr. Montemagno and Mr. Bickham in their testimony, corroborated by contemporaneous Cablevision business documents, precisely reflect the type of “legitimate reasons” the Presiding Judge and the Commission have recognized in past cases as non-discriminatory. Indeed, in past cases the Commission has found that legitimate business justification existed for MVPD carriage decisions even where—unlike in this case—there was a “paucity of documentation corroborating” witness testimony that the costs of carrying a complainant network outweighed the benefits.⁷⁶² Other than vague suggestions that Cablevision did not perform a robust enough analysis of GSN’s carriage, or should have changed its mind in the face of a temporary flurry of subscriber complaints, GSN introduced no evidence at trial contradicting the contemporaneous documentary evidence and witness testimony showing that Cablevision retired a relatively unpopular network with which it had no existing contract in order to save costs.⁷⁶³ That is the essence of a good faith business decision that cannot be challenged under Section 616.

⁷⁶² *TCR Sports Broad.*, 25 FCC Rcd. at 18114; *see also WealthTV*, 24 FCC Rcd. at 12989, 12992 (relying on witness testimony in concluding that MVPDs had non-discriminatory reasons for carriage decisions).

⁷⁶³ *See Proposed Findings of Fact, supra*, at ¶¶ 50-52. It bears noting that GSN’s claim of discrimination boils down to an argument that the contractual provision in the parties’ carriage agreement violated the program carriage rules. However, that claim should have been brought within one year of executing the agreement and is now time barred. Applying Judge Edwards’s reasoning from the *Tennis Channel* concurrence to these facts, under the Commission’s regulations GSN’s claim is time-barred because it was brought more than one year after Cablevision and GSN entered into the agreement that gave Cablevision that right. *Tennis Channel*, 717 F.3d at 1003-1004 (Edwards, J., concurring) (statute of limitations began to run when Tennis Channel entered into a carriage agreement that gave Comcast the “unfettered right to carry Tennis Channel on a distribution tier of Comcast’s own choosing”). Although there was some debate at the hearing about whether the Presiding Judge should rule on this issue, if he determines it is appropriate to do so, GSN’s failure to comply with the statute of limitations provides yet another independent basis for dismissing GSN’s carriage complaint.

D. Cablevision’s Favorable Treatment of Its Affiliated Networks, Standing Alone, Is Not Circumstantial Evidence of Discrimination

252. GSN attempted to prove at trial that Cablevision treated its affiliated networks better than it treated GSN.⁷⁶⁴ As set forth above, however, the Commission has established a two-part test that GSN must satisfy in order to establish circumstantial evidence of discrimination; unfavorable treatment of an unaffiliated network is the second part of the equation. GSN’s “threshold burden” is to prove that it is similarly situated to a Cablevision affiliate.⁷⁶⁵ The implications of the Commission’s rules and this Court’s precedent are clear: so long as GSN is not similarly situated to WE tv or Wedding Central, Cablevision is entitled to run its vertically-integrated business in a manner that maximizes profits for the enterprise as a whole, whether that results in favorable treatment for affiliated networks or not.

253. As demonstrated above, GSN cannot discharge that threshold burden of showing similarity. That renders moot the grab-bag of issues raised by GSN, such as whether Cablevision and WE tv engaged in arms-length carriage negotiations, whether WE tv has better channel placement than GSN, or whether WE tv is protected from retiering by virtue of its ownership.⁷⁶⁶ And unless GSN is similarly situated to Wedding Central—which it is not—it does not matter for the purposes of this case whether Wedding Central received broad Cablevision carriage for a six-month period when GSN did not, or whether Wedding Central received marketing and promotional support from Cablevision when GSN did not.⁷⁶⁷

⁷⁶⁴ See Proposed Findings of Fact, *supra*, at ¶¶ 177-185.

⁷⁶⁵ *WealthTV*, 24 FCC Rcd. at 13000 (holding that the complainant’s “brash” claims that defendant MVPD’s applied different standards to their affiliates did not prove discrimination because the networks were not similarly situated).

⁷⁶⁶ See Proposed Findings of Fact, *supra*, at ¶ 179.

⁷⁶⁷ See Proposed Findings of Fact, *supra*, at ¶ 185.

254. In any event, GSN's allegation that Rainbow networks received favorable treatment on the basis of affiliation is not borne out by the evidence. To begin, the evidence showed that Cablevision engaged in arms-length negotiations with its affiliated networks regarding terms and conditions of carriage.⁷⁶⁸ As a result of these negotiations, Cablevision carried WE tv Central (during its short life) Cablevision carried Wedding Central in the New York DMA; and Cablevision carried the other Rainbow networks, IFC and Sundance, on tiers with lower penetration than the Family tier.⁷⁶⁹

255. As for GSN's allegations of unfavorable channel placement and Cablevision's lack of promotional support, the trial record shows that they are also exaggerated. Cablevision carries or carried two of its affiliates, Sundance and Wedding Central, more than one hundred channels higher than it carried GSN.⁷⁷¹ Although the record showed that WE tv may have benefited from the channel neighborhood in which it was placed, there is no evidence that GSN ever raised channel placement as an issue in its carriage negotiations with Cablevision, and

⁷⁶⁸ See Proposed Findings of Fact, *supra*, at ¶¶ 180-81.

⁷⁶⁹ See Proposed Findings of Fact, *supra*, at ¶¶ 181-82.

⁷⁷⁰ See Proposed Findings of Fact, *supra*, at ¶ 183.

⁷⁷¹ See Proposed Findings of Fact, *supra*, at ¶ 184.

Cablevision had no reason to believe that the two networks should be placed in the same neighborhood.⁷⁷² Similarly, un rebutted testimony from Cablevision witnesses showed that the marketing support Cablevision provided to Wedding Central when it launched was not unusual; indeed, GSN had received promotional support from Cablevision

773

256. Moreover, GSN cannot explain why, if these issues presented such compelling evidence of Cablevision's unfavorable treatment, GSN did not make them part of the carriage complaint it filed in 2011. GSN certainly knew at that time (and had known for years) that it was on a lower channel (and in an allegedly poorer neighborhood) than WE tv in Cablevision's systems, and knew that Cablevision had not provided it with any marketing support since The fact that GSN raised these issues for the first time years after filing its complaint seriously undermines the bona fides of GSN's claims.⁷⁷⁴

E. GSN Has Not Established that an Inference of Discrimination Can Be Drawn from a Cost/Benefit Analysis of Cablevision's Retiering Decision

257. GSN's analysis of the costs and benefits of Cablevision's retiering cannot support a finding of discriminatory treatment. First, the cost-benefit analysis to which GSN has devoted so much attention is irrelevant under *Tennis Channel* unless GSN and WE tv are

⁷⁷² See Proposed Findings of Fact, *supra*, at ¶ 184.

⁷⁷³ See Proposed Findings of Fact, *supra*, at ¶ 185.

⁷⁷⁴ GSN's belated claims of unfavorable treatment present statute of limitations issues of their own. Specifically, because the parties' carriage agreement does not address channel placement, giving Cablevision complete discretion as to that matter, GSN's claims of discriminatory channel positioning arose at the latest when it last renewed the agreement, under 47 C.F.R. § 76.1302(f)(1). GSN's claim that Wedding Central received marketing support and promotion, when GSN did not, should have been brought within one year of Wedding Central's launch in 2009 (when it received the promotional support GSN now complains about). Instead, GSN waited for years to raise this issue.

similarly situated, which they are not. In any case, the evidence does not show that the costs of retiering GSN outweighed the benefits to Cablevision. To the contrary, the weight of the evidence shows that the savings of license fees, the addition of subscribers to the Sports & Entertainment tier, and the absence of meaningful customer churn all support the conclusion that Cablevision made a good faith and rational business decision to retier GSN.⁷⁷⁵

258. Cablevision presented undisputed, real-world evidence that it saved over per month—approximately million per year—in carriage fees by retiering GSN, and that it anticipated little to no sustained subscriber outcry or churn as a result of making that move.⁷⁷⁶ GSN presented no evidence that Cablevision would have benefited (for example, in the form of additional subscribers or local advertising revenue) by maintaining GSN’s carriage on a broadly-penetrated tier. Rather, GSN emphasized evidence purporting to show that Cablevision ultimately suffered a loss from the GSN retiering.

259. GSN’s cost-benefit evidence consists entirely of Dr. Singer’s unreliable expert analysis. The heart of Dr. Singer’s analysis, concerning the number of customers who churned away from Cablevision as a result of the retiering, is based on an analysis that he conceded is not statistically significant at a level generally accepted by economists.⁷⁷⁷ This

⁷⁷⁵ *Tennis Channel*, 717 F.3d at 985. Under *Tennis Channel*, the cost-benefit assessment must, by its very nature, be based upon evidence available at the time of the retiering. *See, e.g., id.* (stating that “Neither the analysis provided at the time, nor testimony received in this litigation, made (much less substantiated) projections of any resulting increase in revenue for Comcast” from Tennis Channel’s proposed tiering change), 986 (holding that Tennis Channel had failed to present evidence of “changes in revenue [for Comcast] to offset the proposed cost increase for Tennis’s broader distribution” and relying on contemporaneous analysis conducted by Comcast showing that Comcast would not benefit from broader Tennis Channel carriage). Any post-retiering evidence is at most confirmatory in nature.

⁷⁷⁶ *See Proposed Findings of Fact, supra*, at ¶¶ 44, 188.

⁷⁷⁷ *See Proposed Findings of Fact, supra*, at ¶¶ 190 n. 575, 193.

means that Dr. Singer’s analysis cannot support his opinion that subscribers left Cablevision because of the GSN retiering.⁷⁷⁸ Dr. Singer’s further estimates of subscriber churn—in which he opined that subscribers who received a promotional subsidy would have left Cablevision absent the subsidy—are based on speculative assertions contradicted by the record.⁷⁷⁹ Finally, Dr. Singer’s testimony concerning the “goodwill” losses that Cablevision suffered as a result of the retiering were shown to be unsupported by any generally accepted methodology and based on invalid assumptions as well.⁷⁸⁰ As a result, Dr. Singer has provided no reliable basis for concluding that Cablevision suffered any loss as a result of retiering GSN.⁷⁸¹

260. Similarly, Dr. Singer’s “net profit sacrifice” analysis, in which he purported to estimate the costs of a hypothetical WE tv retiering, and compared those costs to the costs of a GSN retiering, is entitled to no weight. The record shows that Dr. Singer did not conduct an “apples-to-apples” comparison of the actual costs to Cablevision of retiering GSN and the theoretical costs of retiering WE tv.⁷⁸² Rather, as Mr. Orszag testified without contradiction, Dr. Singer included requirements in his analysis of WE tv that he did not include in his analysis of GSN, leading to a dramatic understatement of any hypothetical churn arising from a WE tv retiering.⁷⁸³ And as Mr. Orszag further explained, the premise of Dr. Singer’s

⁷⁷⁸ See Proposed Findings of Fact, *supra*, at ¶¶ 191-93.

⁷⁷⁹ See Proposed Findings of Fact, *supra*, at ¶¶ 194-96.

⁷⁸⁰ See Proposed Findings of Fact, *supra*, at ¶ 197.

⁷⁸¹ See *Clark v. Takata Corp.*, 192 F.3d 750, 757-58 (7th Cir. 1999); see also Fed. R. Evid. 702 (expert must be “qualified as an expert by knowledge, skill, experience, training, or education”). See generally Cablevision Sys. Corp.’s Motion *In Limine* to Partially Exclude the Testimony of Dr. Hal J. Singer, *Game Show Network, LLC v. Cablevision Sys. Corp.*, MB Docket No. 12-122 (June 12, 2015).

⁷⁸² See Proposed Findings of Fact, *supra*, at ¶ 198.

⁷⁸³ See Proposed Findings of Fact, *supra*, at ¶ 199.

analysis was flawed from the start, because Dr. Singer purported to apply actual data from the GSN retiering to the speculative possibility that WE tv would be retiered.⁷⁸⁴ This is not a methodology that creates reliable results, and therefore should not be credited by the Presiding Judge.

261. In contrast to Dr. Singer’s testimony, Mr. Orszag’s opinion that the retiering was profitable to Cablevision is the product of a reliable methodology. Mr. Orszag’s conclusions are statistically sound within a confidence interval commonly accepted by experts in his field; he did not include any speculative assumptions unsupported by the record facts; and he applied methodologies grounded in commonly accepted economic principles.⁷⁸⁵

XI. GSN HAS FAILED TO MEET ITS BURDEN OF PROVING THAT CABLEVISION’S CONDUCT UNREASONABLY RESTRAINED GSN’S ABILITY TO COMPETE FAIRLY

262. To prevail on its Section 616 claim against Cablevision, GSN must also prove that the purported discriminatory retiering “unreasonably restrain[ed] . . . [GSN’s ability] to compete fairly”⁷⁸⁶ Unreasonable restraint is case specific, but is “based on the impact of the [charged] adverse carriage action ‘on the programming vendor’s subscribership, license fee revenues, advertising revenues, ability to compete for advertisers and programming, and ability to realize economies of scale.’”⁷⁸⁷ In all events, Section 616 “demand[s] proof of the significant or material detrimental effect implicit in the term ‘unreasonable restraint.’”⁷⁸⁸ As a result, GSN

⁷⁸⁴ See Proposed Findings of Fact, *supra*, at ¶ 199.

⁷⁸⁵ See Proposed Findings of Fact, *supra*, at ¶¶ 189-90.

⁷⁸⁶ 47 C.F.R. § 76.1301(c); Second Report & Order at 11505; *Tennis Channel*, 717 F.3d at 983.

⁷⁸⁷ Second Report & Order at 11505 n.60 (citing decisions by Media Bureau).

⁷⁸⁸ While the Commission has not interpreted Section 616 to apply the same standards as would be applicable under antitrust law, the D.C. Circuit’s recent guidance states that Section 616 “applies only

cannot satisfy its burden “merely by showing that [Cablevision’s] individual carriage decisions adversely affected its competitive position in the marketplace.”⁷⁸⁹ The question is not whether GSN would have been better off absent the adverse carriage decision (which is true in every carriage case), but whether GSN has been unreasonably restrained from fair competition.

263. The evidence GSN has offered to support its claim fails under any reading of Section 616. Under each metric the Commission has considered in prior cases, GSN has not remotely been unreasonably restrained:

- **Subscribership:** Although GSN lost of its national subscriber base in the immediate aftermath of the retiering, there is no dispute that GSN’s subscribership has grown significantly since the retiering. GSN has added more than million subscribers and has nearly million total subscribers. GSN has also
- **Financial Performance:** GSN’s television revenue has
- **Ability to Compete for Advertisers and Programming:** GSN’s advertising revenues grew from million in 2010 to million in 2013.⁷⁹³ With respect to programming, there is no dispute that GSN has significantly increased its investment in original programming since the retiering.⁷⁹⁴ GSN

to discrimination that amounts to an unreasonable restraint under antitrust law.” *Tennis Channel*, 717 F.3d at 988, 992 (Kavanaugh, J., concurring).

⁷⁸⁹ *Wealth TV*, 24 FCC Rcd. at 13002; *see also Time Warner Cable*, 729 F.3d at 166 (“[W]e do not assume that the FCC will effectively nullify the unreasonable restraint requirement of [Section 616] by recognizing *any* detrimental effect on an unaffiliated network . . . rather than demanding proof of the significant or material detrimental effect implicit in the term ‘unreasonable restraint.’”).

⁷⁹⁰ *See Proposed Findings of Fact, supra*, at ¶¶ 207-08.

⁷⁹¹ *See Proposed Findings of Fact, supra*, at ¶¶ 210-12.

⁷⁹² *See Proposed Findings of Fact, supra*, at ¶ 213.

⁷⁹³ *See Proposed Findings of Fact, supra*, at ¶ 216.

⁷⁹⁴ *See Proposed Findings of Fact, supra*, at ¶¶ 214-15. Although GSN now seeks to argue that its significant post-retiering investment in programming is actually evidence of unreasonable restraint because GSN needs to compete harder, this argument unsupported by the record and inconsistent with

at most offers questionable evidence that it lost a handful of advertisers, and has not explained why key advertising executives in the New York DMA cannot reasonably gain access to GSN.⁷⁹⁵

- Ability to Realize Economies of Scale: There is no dispute that GSN was a fully distributed network with million subscribers before the retiering and nearly million subscribers today. GSN's scale is unquestioned and has been growing since the retiering.⁷⁹⁶

264. Nor can GSN carry its burden by arguing that its performance has declined relative to what it would have achieved absent the retiering. First, there is a failure of proof: not a single GSN fact or expert witness offered any credible testimony about how GSN would have performed absent the retiering. Second, it is always true in a carriage dispute that the complaining network would have been better off absent the carriage decision at issue; that is why the network filed its complaint. But as the Court previously recognized, a complainant must do more than “merely . . . show[] that the defendants’ individual carriage decisions adversely affected its competitive position in the marketplace.”⁷⁹⁷ Under GSN’s contrary reading of Section 616, every unfavorable carriage decision would unreasonably restrain the affected network, thereby reading the unreasonable restraint language out of the statute.

265. Finally, Cablevision lacked sufficient market power to restrain GSN. In the national market, Cablevision’s million total subscribers represent just over of GSN’s current subscribers and less than of the national market in which GSN

Section 616’s statutory purpose. GSN is not arguing that it is unable to compete fairly, and the manner in which it chooses to deploy its resources years after the retiering is not evidence of a Section 616 violation.

⁷⁹⁵ See Proposed Findings of Fact, *supra*, at ¶ 216.

⁷⁹⁶ See Proposed Findings of Fact, *supra*, at ¶¶ 205-08.

⁷⁹⁷ *WealthTV*, 24 FCC Rcd. at 13002; *see also Time Warner Cable*, 729 F.3d at 166 (“[W]e do not assume that the FCC will effectively nullify the unreasonable restraint requirement of [Section 616] by recognizing *any* detrimental effect on an unaffiliated network . . . rather than demanding proof of the significant or material detrimental effect implicit in the term ‘unreasonable restraint.’”).

competes.⁷⁹⁸ This is clearly insufficient to demonstrate national market power, given that Judge Kavanaugh, in his *Tennis Channel* concurrence, concluded that even 24% of the national market is insufficient to demonstrate market power.⁷⁹⁹

266. Although GSN has asserted that the relevant market is the New York DMA, it has not offered any expert testimony to support this claim. In fact, while GSN’s expert Dr. Singer makes the conclusory statement that the New York DMA is the proper market because “[a]ny decision to discriminate in favor of an affiliated network . . . is a local one,”⁸⁰⁰ he does not do any analysis or muster any evidence to support this opinion. To the contrary, Dr. Singer takes no position on whether Cablevision had sufficient “market power to generate anticompetitive effects.”⁸⁰¹

267. Nevertheless, even if one views the relevant market as a local one, the evidence at trial showed that Cablevision faces significant competition from satellite providers, telecom providers, and other MVPDs in the New York DMA. Specifically, AT&T, DIRECTV, DISH and Verizon collectively have well over two million subscribers in the New York DMA, many of whom live in Cablevision’s footprint and have chosen to forego Cablevision service in

⁷⁹⁸ See Proposed Findings of Fact, *supra*, at ¶¶ 21, 208.

⁷⁹⁹ *Tennis Channel*, 717 F.3d at 992, 994 (Kavanaugh, J., concurring). Indeed, the Commission recently recognized that the cable industry as a whole is subject to effective competition for many of the reasons cited in Cablevision’s motion, including the “ubiquitous nationwide presence of DBS providers, DIRECTV and DISH Network,” and “[t]he level of competing MVPD penetration in all of the DMAs.” *Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section III of the STELA Reauthorization Act*, Report & Order, MB Docket No. 15-53, FCC 15-62, at ¶¶ 7- 9 (2015).

⁸⁰⁰ Proposed Findings of Fact, *supra*, at ¶ 218.

⁸⁰¹ Proposed Findings of Fact, *supra*, at ¶ 218.

favor of its competitors.⁸⁰² Verizon alone has added almost 500,000 subscribers in the New York DMA in the last five years, while Cablevision has lost more than ⁸⁰³

268. GSN has not offered any evidentiary basis for a conclusion that the Cablevision can exercise market power in either a national or local market given increased competition and Cablevision’s diminishing market share, even in its own footprint. Absent such proof by GSN, it cannot rely on assertions of Cablevision market power to establish that it was unreasonably restrained in its ability to compete fairly.

XII. SECTION 76.1301(C) MUST BE NARROWLY CONSTRUED AS APPLIED TO THE CONDUCT OF CABLE OPERATORS

269. Both the ruling and remedy GSN seeks in this matter—that Cablevision discriminated by retiering GSN, and should be forced to restore its broad carriage—implicate grave First Amendment concerns that compel a narrow reading of the Commission’s carriage discrimination regulations.⁸⁰⁴

270. The Commission’s power to interfere with Cablevision’s carriage decisions is constrained by the First Amendment: as the Supreme Court long ago recognized, “[t]here can be no disagreement” that distributors like Cablevision “engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”⁸⁰⁵ The Commission has held that Section 616’s program carriage regulations are

⁸⁰² Proposed Findings of Fact, *supra*, at ¶ 218.

⁸⁰³ Proposed Findings of Fact, *supra*, at ¶ 218.

⁸⁰⁴ See U.S. CONST. amend I.

⁸⁰⁵ *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”); see also *Tennis Channel, Inc. v. Comcast Cable Commc’ns LLC*, Mem. Op. & Order, MB Docket No. 10-204, File No. CSR-8258-P, ¶ 97 (2012) (noting that an MVPD’s “First Amendment Rights are implicated” by a carriage remedy because an MVPD “is entitled, in the exercise of its editorial discretion, to choose to carry” the channels it desires).

content-neutral and their application to a required-carriage remedy are subject to intermediate scrutiny. For a content-neutral speech regulation to be sustained under this level of scrutiny, it must be one that “furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”⁸⁰⁶

271. GSN’s request for relief cannot withstand intermediate scrutiny because Cablevision’s retiering of GSN did not implicate a substantial government interest. Section 76.1301(c) of the Commission’s rules derived from the Cable Television Consumer Protection and Competition Act of 1992, Section 616(a)(3), which was written in response to Congressional concern that mergers and acquisitions of various cable operators would undermine competition and diversity in programming.⁸⁰⁷ A primary goal of the program carriage rules was to avoid hindering competition in the video distribution market.⁸⁰⁸ Since then, however, the facts on the ground have changed: over the last twenty years there has been a dramatic increase in competition in the cable industry, first as a result of direct broadcast satellite operators including DIRECTV and Dish Network, next as a result of telephone companies including AT&T and Verizon, and now as the result of Internet-based and over-the-top television options, such as Netflix and Hulu.⁸⁰⁹ Thus, as recent opinions from the D.C. Circuit and Second Circuit make clear, today a substantial governmental interest in effectuating the Commission’s carriage

⁸⁰⁶ *Turner I*, 512 U.S. at 662 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

⁸⁰⁷ H.R.Rep. No. 102-628, at 40 (1992); 47 C.F.R. § 76.1301(c).

⁸⁰⁸ Second Report & Order at 11497-98.

⁸⁰⁹ Proposed Findings of Fact, *supra*, at ¶ 218.

discrimination regulations, sufficient to overcome First Amendment concerns, exists only “when the video programming distributor possesses market power in the relevant market.”⁸¹⁰

272. The record here shows that Cablevision does not have market power in any relevant market,⁸¹¹ much less in the “national video programming distribution market” identified by the Commission and Judge Kavanaugh as the “relevant market” in the *Tennis Channel* case.⁸¹² GSN competes for advertisers and viewers in the national market as does WE tv, and Cablevision has roughly a three percent of total WE tv viewership and total nationwide MVPD subscribers.⁸¹³ Cablevision therefore could not have exercised market power in the national video programming distribution market as a matter of law.⁸¹⁴

273. Likewise, Cablevision cannot exercise market power in the New York DMA because of the increased competition that Cablevision faces from satellite operators like DIRECTV and Dish, telecoms like Verizon and AT&T, and Internet-based and over-the-top providers like Netflix and Hulu.⁸¹⁵ These are all substitutes available to consumers within the

⁸¹⁰ *Tennis Channel*, 717 F.3d at 993 (Kavanaugh, J., concurring); see also *Time Warner Cable Inc.*, 729 F.3d at 165 (“The program carriage regime requires an unaffiliated-network complainant to make a case-specific showing that an MVPD ‘unreasonably restrain[ed]’ its ability to ‘compete fairly,’ and market power is generally a ‘significant consideration’ under such a requirement.”) (internal citations omitted); *Agape Church, Inc. v. FCC*, 738 F.3d 397, 414-15 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (concluding that “absent a finding of market power, the Government may not infringe on the cable operators’ editorial discretion”).

⁸¹¹ Proposed Findings of Fact, *supra*, at ¶ 218.

⁸¹² *Tennis Channel*, 717 F.3d at 992 (Kavanaugh, J., concurring).

⁸¹³ Proposed Findings of Fact, *supra*, at ¶ 176.

⁸¹⁴ *Tennis Channel*, 717 F.3d at 992, 994 (Kavanaugh, J., concurring) (“In today’s highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market.”).

⁸¹⁵ Proposed Findings of Fact, *supra*, at ¶ 218.

Cablevision footprint.⁸¹⁶ The current robust competition in the New York DMA shows that any concerns about “bottleneck” control in the cable industry animating prior decisions under Section 616 simply do not apply to Cablevision today.⁸¹⁷

274. Because a competitive market can be achieved and maintained without dictating Cablevision’s actions, under these circumstances the infringement of Cablevision’s First Amendment rights is impermissibly greater than needed to further the Government’s putative interest. Consequently, forcing Cablevision to carry GSN as part of its expanded basic tier would infringe Cablevision’s First Amendment speech rights by forcing Cablevision to speak to its subscribers in a manner not of its choosing in the absence of a substantial government interest.⁸¹⁸

⁸¹⁶ Proposed Findings of Fact, *supra*, at ¶ 218; *see also* Compl. ¶ 24 (stating that GSN is available to subscribers on Cablevision’s “in-market competitors AT&T, DIRECTV, DISH and Verizon”).

⁸¹⁷ *Tennis Channel*, 717 F.3d at 993-94 (Kavanaugh, J., concurring).

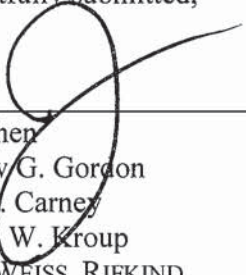
⁸¹⁸ Although for purposes of this decision it is unnecessary to question the Commission’s judgment that its carriage-discrimination regulations are content-neutral, we note that under established law they are likely content-based, and therefore subject to strict scrutiny, because they force MVPDs to distribute programming based on the message the programming conveys. The regulations may be phrased in generalities that do not explicitly mention content but a law that “appears content neutral on its face” will nevertheless receive strict scrutiny if “it [is] *de facto* content based.” *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 434 (6th Cir. 2004). The Commission’s regulations, which require the fact-finder to examine the programming genre, target programming, and programming audience of particular networks, and come to conclusions about what is shown on the networks and who views them, clearly mandate an inquiry into the networks’ programming content. To compel an MVPD to then carry a certain network based on the similarity of content is content-based regulation of that MVPD’s speech.

CONCLUSION

275. For the foregoing reasons, Cablevision respectfully requests that the Proposed Findings of Fact and Conclusions of Law be adopted by the Presiding Judge in support of a recommended decision denying the relief sought by GSN in this carriage complaint proceeding.

Dated: September 11, 2015

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